80-1580

No.

Office-Supreme Court, U.S.
FILED
MAR 18 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

LINCOLN UNIVERSITY, et al.,

Petitioners,

v.

C. JAMES TROTMAN, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Do state-related university faculty members who claim that they were unlawfully retaliated against for exercise of their First Amendment freedoms carry the burden of proving that their expressive activities were not so disruptive that they were outside First Amendment protection?

2. Are the memoranda and letters of a university president in which he expresses disapproval of faculty conduct properly subject to "prior restraint" and "chilling effect" treatment?

3. Did the Court of Appeals err in failing to require a balancing of interests in determining whether allegedly "chilled" speech is protected?

4. Is the subjective perception by certain faculty members of a "repressive atmosphere" a sufficient basis for the intervention of the federal courts in the day-to-day administration of a university through the imposition of "judicial censure"?

PARTIES BELOW

In the Court of Appeals, appellants were: C. James Trotman, Mary Farrell, Andrew Murray, Virginia Gunn, Thomas Jones, Julius Bellone, Deforest Rudd, Peter F. Hoffer, Donald Pierce, Richard Winchester, William T. Johnson, Edward B. Groff and Leland Smucker. The named appellees were: the Board of Trustees of Lincoln University of the Commonwealth System of Higher Education, Lincoln University of the Commonwealth System of Higher Education, and Herman Branson, individually and as President of Lincoln University. The District Court held that the Board of Trustees was not an entity that could be sued as such and that holding was not appealed. App. A3.

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OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 635 F. 2d 216 and is reproduced at pp. A1-A30 of the separately bound appendix to this petition ("App."). The unreported opinion of the District Court for the Eastern District of Pennsylvania is reproduced at App. A31-A82.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on November 25, 1980. App. A83-A84. The Court of Appeals denied a timely Petition for Rehearing En Banc on December 19, 1980. App. A85-A86. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS

U. S. Const., amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const., amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Lincoln University, the country's oldest college for the higher education of black students, is a state-related educational institution located in Pennsylvania. The controversy that gave rise to this litigation has its roots in Lincoln's change in status in 1972 from a private to a state-related institution and the University's subsequent efforts to increase its student-faculty ratio.

Guidelines promulgated by the Pennsylvania Department of Education, applicable to Lincoln when Lincoln became state-related in 1972, set a ratio of 20 students to 1 faculty member; Lincoln's student-faculty ratio was 12 to 1. An increase in the ratio would, of necessity, have required significant reductions in the size of the Lincoln faculty. Dr. Herman Branson, who was appointed as the President of Lincoln University in 1970, was directed by the University's Board of Trustees to take action to reach a student-faculty ratio of 20 to 1 by September, 1978.

Accordingly, Dr. Branson advised the relevant faculty committee that he intended to send "retrenchment notices"[1] to all faculty members so that the University would be in a position to terminate sufficient faculty to meet both the Pennsylvania guidelines and the Board of Trustees' directives. The faculty refused to cooperate. Certain faculty members, including some of the plaintiffs, instead voted to censure Dr. Branson and wrote to the Governor of Pennsylvania demanding that he replace Dr. Branson. When Dr. Branson and the University administration did not retreat from the retrenchment plan, a "cadre of faculty dissidents . . . embarked on a campaign of intimidation, obstruction, harrassment and personal vilification in order to accomplish their stated objective

1. The "retrenchment notices" were notices of termination sent because of economic necessity pursuant to a faculty by-law requiring that each faculty member be given one year's notice before termination. *See,* App. A5, A39-A40.

of ousting the President and some or all members of the Board of Trustees".[2]

Dispute over the necessity for faculty reduction[3] was at the center of the friction between the plaintiffs and the University. However, plaintiffs' "campaign" to oust the President also included protests on other "issues." One of these involved the position of chair of the English Department. In 1977, Dr. Gladys Willis was appointed Chairperson of the English Department, replacing plaintiff C. James Trotman. Certain members of the Department faculty, led by Mr. Trotman, "refused to recognize" Dr. Willis as the Department head and vigorously objected to her assignment of courses among the English Department faculty. Opposition to Dr. Willis took the form of attempts to censure her at faculty meetings, circulation of various memoranda about her qualifications and methods, and disruptive demonstrations in her classroom that ultimately resulted in the arrest of Mr. Trotman and another faculty member who refused to leave the classroom when requested to do so by University police.[4]

Another issue that was the subject of considerable protest by plaintiffs was the non-renewal of James Trotman's employment contract. Mr. Trotman had never earned a doctorate in his subject matter field—a prerequisite for tenure. Under the collective bargaining agreement, Mr. Trotman would have automatically received tenure in 1978

2. Transcript of the District Court's oral opinion, App. A80. The "cadre" referred to in the District Court opinion consisted primarily of the plaintiffs in this case. For a more complete discussion of the history of the student-faculty ratio dispute, see the District Court opinion, App. A38-A41.

3. The dispute centered on the necessity for faculty reduction rather than the means by which such reduction could be accomplished because the faculty, feeling that no reductions were necessary, refused to cooperate with the Administration in implementing the Board's directives. See, District Court opinion, App. A40-A41.

4. A more complete discussion of incidents regarding Dr. Willis is set forth in the District Court opinion, App. A42-A46.

if he did not receive a notice of non-renewal. Mr. Trotman claimed that his dismissal was in retaliation for his outspoken criticism of Dr. Branson and the Administration. The District Court found, and its finding was not overturned on appeal, that Trotman's contract was not renewed because of his failure to satisfy the tenure requirement.[5]

Plaintiffs also protested the "retirement" of Edward Groff; Dr. Groff claimed that his "retirement" was in retaliation for his criticism of Dr. Branson. After undergoing brain surgery and being approved for total disability insurance, Dr. Groff received a letter from Dr. Branson acknowledging Groff's retirement disability. Upon receipt of this letter Groff wrote a number of accusatory letters to the Trustees by which Dr. Branson was informed that Dr. Groff had intended to be placed on sick leave rather than retirement. A short time later Dr. Groff was placed on disability leave status as he desired.[6]

The opposition of plaintiffs to defendants' positions on these issues and to Dr. Branson personally was both outspoken and extensive. The major vehicles for communication of plaintiffs' vehement disapproval of President Branson were two organizations: Friends of Lincoln University ("F. L. U."), and the Faculty Action Committee, both of which had as their goal a new President for Lincoln University.[7] Plaintiffs, individually and in groups, pro-

5. See, District Court opinion, App. A47-A55. Pursuant to the by-law provision mentioned in footnote 1 at p. 2, *supra*, Mr. Trotman had to receive notice of the non-renewal of his employment contract one year before its effective date. If the University did not give Mr. Trotman such notice, he would have automatically received tenure under the collective bargaining agreement by virtue of his length of employment at Lincoln.

6. See, District Court opinion, App. A59-A60. Other subjects of plaintiffs' protests are set forth in detail in the opinion of the District Court, App. A55-A66.

7. See, District Court opinion, App. A35 and A40. The plaintiffs in this case were the active members of these two organizations and also were active members of the faculty union; each of the plain-

tested University actions by various means including: 1) picketing on five separate occasions: twice on campus, once at the office of the acting Board Chairperson and twice outside the law offices of the counsel to the University; 2) demonstrating in the classroom of Dr. Willis during scheduled class time; 3) repeatedly raising the disputed issues for discussion and making motions to censure Dr. Branson and Dr. Willis at faculty meetings; 4) calling "divisional meetings" to censure Dr. Willis; 5) holding "alternative" convocations; 6) speaking at meetings of and writing letters to the Board of Trustees; 7) distributing flyers on the campus; 8) sending "open" letters and telegrams to public officials,[8] and to editors of local publications advocating the ouster of President Branson; 9) seeking the censure of Lincoln University by the American Association of University Professors; 10) circulating copies of letters written by plaintiffs to President Branson critical of him and his policies; and 11) distributing memoranda to the faculty. Testimony was taken at trial with regard to in excess of 100 memoranda, letters, minutes of meetings and other documents containing strong criticism of Dr. Branson or his policies.

Plaintiffs' activity culminated in the filing of this lawsuit in the Federal District Court for the Eastern District of Pennsylvania in June of 1978.[9] The jurisdiction of the

7. (Cont'd.)

tiffs who testified was an officer of the faculty union, the Lincoln University Chapter of the American Association of University Professors, or a member of one of its committees. App. A35.

8. In a telegram to the Governor of Pennsylvania, plaintiff Johnson, seeking Branson's removal as President, accused Branson of "terribly irrational and destructive" conduct and characterized him as "inhumane", "vicious", "vindictive" and "arrogant with power given him by a weak Board." District Court opinion, App. A71-A72.

9. One of the plaintiffs stated in a press interview that this lawsuit was part of plaintiffs' campaign against President Branson: "I

District Court was invoked under 28 U. S. C. § 1331 (general federal question jurisdiction) through the allegations of plaintiffs that defendants violated plaintiffs' First Amendment rights by retaliating against them for their criticism of University policy and by otherwise infringing their right to freedom of speech.

The actions of defendants that plaintiffs complain of include: 1) the non-renewal of James Trotman's contract; 2) the temporary "retirement" of Edward Groff; 3) the arrest of James Trotman; 4) the removal of W. T. M. Johnson as chairperson of the Chemistry Department; 5) the sending of letters from President Branson to various individual plaintiffs calling them to task for attempting to censure colleagues at faculty meetings, for making inaccurate statements to the press and for circulating confidential faculty evaluations to the entire faculty; and 6) the sending of a telegram to various individual faculty members notifying them that the University regarded picketing to be in violation of the collective bargaining agreement and grounds for discipline.[10]

The District Court, sitting without a jury, granted defendants' motion to dismiss at the conclusion of plaintiffs' case, holding that most of the plaintiffs had not established that their expressive activity was a substantial

9. (Cont'd.)

think if we can win a federal court case against [Branson] there's a better chance we can get rid of him. In the long run that is what we want." Record filed with the Court of Appeals, Vol. V, at 1315a-1317a.

10. The District Court found that the telegram was sent because of the University's good faith belief, based on prior picketing practices of plaintiffs, that the picketing would be over matters subject to the exclusive grievance procedures of the collective bargaining agreement and the University's By-Laws. The District Court also found that none of the plaintiffs was deterred from picketing by the telegram. App. A64. A more extensive discussion of plaintiffs' complaints may be found in the opinion of the Court of Appeals, App. A6-A14.

factor in any actions taken by the University, and that the other plaintiffs had not shown that their expressive activity was protected. The District Court also found that there was no intent by the defendants to chill or in any way inhibit the constitutionally protected activities of the faculty members and that, as a matter of fact, none of the plaintiffs was inhibited from engaging in expressive activity. App. A76-A77. Plaintiffs appealed to the Court of Appeals, which vacated and remanded the case for further consideration.

The Court of Appeals divided its analysis into two sections corresponding to the two types of allegations made by plaintiffs: 1) plaintiffs who felt that some specific action taken with regard to them personally was in retaliation for their speech or conduct; and 2) plaintiffs who, while not allegedly "retaliated" against, felt that there was a "repressive atmosphere" on the Lincoln campus. In the section discussing the "retaliatory action" claims, the Court of Appeals attempted to apply the analysis set forth in *Pickering v. Board of Education*, 391 U. S. 563 (1968) and its progeny. However, the Court of Appeals improperly remanded on the basis of dicta in the District Court opinion and, in so doing, gave instructions to the District Court on the allocation of the burden of proof that are in conflict with the decisions of this Court.

The second section of the Court of Appeals' analysis dealt with those claims that were based on letters sent by the President of Lincoln to individual plaintiffs commenting on activities in which such plaintiffs had already engaged; plaintiffs claimed that these letters inhibited them from exercising their First Amendment freedoms. The District Court found that such informal communications neither were intended to *nor had the effect of* inhibiting plaintiffs' freedom of speech.[11] Nevertheless, the Court of Appeals reversed and remanded on the basis that the

11. App. A77, A81.

District Court had applied neither "prior restraint" nor "chilling effect" analysis.

Petitioners herein, defendants below, seek a writ of certiorari to the United States Court of Appeals for the Third Circuit, and a reversal of the decision of that Court, for the reasons stated below.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals has upset the delicate balance between freedom of speech and the efficient administration of public institutions that has been carefully developed by this Court.[12] This balance encourages the dialogue and free exchange of ideas that are protected by the First Amendment while not permitting expression that is so disruptive that it undermines the ability of the public institution to provide the service for which it was founded. The result of the Court of Appeals' departure from the principles enunciated by this Court will be the replacement of the dialogue between faculty and administration with a monologue by dissident faculty members who need no longer concern themselves with the impact of their behavior on the university's ability to fulfill its educational mission.

In addition, the decision of the Court of Appeals in this case concerning the alleged "repressive atmosphere" at the University will have a serious and immediate detrimental impact on the administration of state-related educational institutions. The Court of Appeals' unwarranted extension of "prior restraint" and "chilling effect" analysis to informal communications between public employers and employees will effectively stifle the university administration's freedom to express disagreement with or disapproval of faculty members' criticism of or personal attacks on university administrators, no matter how disruptive or inaccurate those attacks might be. If every memorandum or letter from an administrator to an individual faculty member questioning or disagreeing with that faculty member's conduct may be the basis for federal litigation, the university's educational mission will be bogged down in a morass of lawsuits in which faculty

12. It is very important to note, in weighing the impact of the Court of Appeals decision, that the constitutional principles articulated in that decision apply not only to state university administrators but also to all other public employers.

members seek to vindicate personal opinions and intimidate administrators with whom they disagree. The Court of Appeals' approval of the federal district courts as a forum for "judicial censure" will likely result in innumerable suits seeking nothing more than judicial sanction for one side of what are essentially internal disagreements about administrative or educational policy.

The Court of Appeals opinion not only contains principles of potentially disastrous implications for state-related universities, and, indeed, all public employers, but also contains four substantial errors of law that bring the Court of Appeals into conflict with the governing decisions of this Court as well as the decisions of other courts of appeals. Each of these holdings will severely and improperly restrain university administrators in the efficient performance of their duty to provide educational services, and cumulatively they will effectively stifle expression by administrators seeking to carry out their educational mission, to the ultimate detriment of students and faculty alike.

1. The Court of Appeals found, in conflict with decisions of this Court, that disruptive expressive activity was nonetheless protected by the First Amendment.

This Court has consistently stated, and the Court of Appeals in this case held, that the examination of a teacher's claim of retaliation based on engagement in protected activity requires a three step process. First, the plaintiff must show that he engaged in protected activity. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U. S. 274, 287 (1977). Second, having established by a preponderance of the evidence that his speech is constitutionally protected, plaintiff must then prove, again by a preponderance of the evidence, that the protected conduct played a substantial part in the employer's allegedly retaliatory action. *Id; Givhan v. Western Line Consolidated School District,* 439 U. S. 410, 416 (1979). Only if

plaintiff has carried his burden of proof on the first two points need the court go on to address the third: whether defendant can demonstrate that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy,* 429 U. S. at 287.

The District Court, at the conclusion of plaintiffs' case, found that, as to their "retaliatory action" claims,[13] plaintiffs had failed to show that they had engaged in protected activity and also failed to establish that any such allegedly protected activity was a substantial factor in any decisions made by the defendants. The Court of Appeals' decision to vacate and remand this portion of the District Court's opinion was based in large part on an improper allocation of the burden of proof, in direct conflict with the decisions of this Court.[14]

As stated in *Pickering v. Board of Education,* 391 U. S. 563, 568 (1968), the question of whether the faculty member's speech is constitutionally protected necessarily entails striking a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In an educational setting, the State's interest in promoting efficiency and maintaining the proper atmosphere for learning and teaching warrants consideration of the manner in which plaintiffs'

13. The actions of defendants that plaintiffs claim were in retaliation for plaintiffs' expression include the non-renewal of James Trotman's employment contract, the "retirement" of Edward Groff, the removal of W. T. M. Johnson from the Department Chairmanship and the arrest of Trotman. See, App. A6-A9.

14. The Court of Appeals also based its reversal on a disagreement with dicta in the District Court opinion about the allocation of burdens in the third step of "retaliatory action" analysis. As plaintiffs failed to carry their burden on the first two elements of proof, dicta of the District Court was not relevant to plaintiffs' appeal to the Court of Appeals and therefore not a proper basis of reversal. See, discussion at page 14, *infra.*

speech is expressed and whether such speech presents a question of maintaining discipline by immediate superiors or harmony among co-workers. *See, Pickering,* 391 U. S. at 570 and *Givhan v. Western Line Consolidated School District,* 439 U. S. 410, 415 (1979). The disruptive effect of plaintiffs' speech is therefore a factor to be weighed in the *Pickering* balance in determining whether the speech in question is protected. *Plaintiffs* must meet their burden of proof by establishing that their expressive activity is protected, as the Court of Appeals recognized. However, the Court of Appeals appeared to conclude that it was not necessary to engage in the *Pickering* balance in deciding whether the speech was protected; the Court stated that the seriously disruptive actions of plaintiffs may rather be in the nature of an excuse for defendants' actions after plaintiffs establish only that their conduct involved speech.[15] This analysis is in direct conflict with *Pickering* and its progeny.

If plaintiffs' expressive activity is disruptive or otherwise substantially interferes with the primary mission of the educational institution, then it is outside the protection of the First Amendment. Where, as here, the trial court finds that the activity was disruptive, plaintiffs have failed to carry their initial burden of proof on the question of whether their conduct is protected. In the absence of protected conduct no First Amendment claim can be made out.

The Court of Appeals flatly stated, despite the District Court's findings of disruption, that it "seems too evident to require any discussion" that "much of the

15. "[D]efendants must be given their opportunity to show that plaintiffs' speech and actions in this dispute fell within the range of conduct which has been held to justify administrative sanctions." Court of Appeals opinion, App. A25. In addition to incorrectly allocating the burden of proof, this statement of the Court of Appeals inexplicably ignored the clear finding of the District Court that the conduct of plaintiffs was in fact so disruptive that it was outside the protection of the First Amendment. Court of Appeals opinion, App. A27, and District Court opinion, App. A69, A77 and A80.

activity engaged in by plaintiffs falls within the protection of the First Amendment".[16] Certainly, as the Court of Appeals noted, expressive activity is not necessarily removed from protection merely because it is "strident" or "misguided". However, the District Court found, as a fact, that the tactics employed by the plaintiffs as a group "unquestionably had a disrupting effect on the University's primary mission—education and the advancement of the Arts and Sciences",[17] and that the activities of some individual plaintiffs were so disruptive within their own departments that they could not be given constitutional protection.[18] Despite those findings of fact, the Court of Appeals inexplicably remanded the case to the District Court to give defendants an "opportunity to show that plaintiffs' speech and actions in this dispute fell within the range of conduct which has been held to justify administrative sanctions."[19]

By so doing, the Court of Appeals, in effect, shifted the burden of proof to defendants on the question of whether plaintiffs' speech was protected and ignored a finding of fact by the District Court that had substantial support in the record and that was not found to be clearly erroneous by the Court of Appeals.[20] Such an interpre-

16. Court of Appeals opinion, App. A16.

17. Court of Appeals opinion, App. A27; District Court oral opinion, App. A80.

18. See, District Court opinion, App. A69, A72. Note that as to the majority of individual plaintiffs' retaliatory action claims the District Court held that such plaintiffs failed to show that their conduct was a substantial factor in the allegedly retaliatory action. See, App. A69, A72-A77.

19. Court of Appeals opinion, App. A25.

20. The principle that plaintiffs must prove their case and that plaintiffs' burden of proof may not be shifted to defendants has been acknowledged by this Court in many contexts, most recently in *Texas Department of Community Affairs v. Joyce Ann Burdine*, 49 U. S. L. W. 4214 (March 4, 1981). The reasoning of this Court in *Burdine* would also compel the reversal of the Court of Appeals de-

tation plainly is in conflict with *Pickering* and cases subsequently decided thereunder.

The Court of Appeals also disagreed with the District Court's statement that where plaintiff alleges retaliation, "[t]he ultimate burden will be on the plaintiff to show not merely that impermissible factors entered into the retaliatory decision or action, but also that 'but for' the protected conduct the action would not have been taken." App. at A27. As has been discussed above, this step of the analysis is reached only after plaintiffs have shown: 1) that their speech was protected, and 2) that any protected speech was a substantial factor in the allegedly retaliatory action taken by defendants. The District Court's holding rested squarely on a finding that plaintiffs failed to meet their initial burden of proof. Any dicta about the allocation of burdens that would be applied had plaintiffs met their burden of proof is completely irrelevant to the holding of the case and therefore an inappropriate basis for reversal. The Court of Appeals' decision to reverse the District Court on the retaliatory action claims is therefore clear error and should be corrected by this Court.

2. **In directing the application of "prior restraint" and "chilling effect" analysis to informal memoranda and letters from university administrators to faculty members, the Court of Appeals departed significantly from principles promulgated by this Court in a manner that will prohibit expressive activity by university administrators.**

The Court of Appeals, in stating that prior restraint analysis should be applied to defendants' individual and ad hoc responses to discrete instances of misconduct by

20. (Cont'd.)

cision on the allocation of the "but for" burden. *See also, Givhan v. Western Line Consolidated School District*, 439 U. S. 410 (1979) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U. S. 274 (1977).

plaintiffs,[21] went far beyond any holding of this Court and in so doing has effectively muzzled any response by administrators of state-related educational institutions to criticism from faculty members.

The analysis of the Court of Appeals applies to all public schools and state-related educational institutions and, in effect, tells the administrators of those institutions that they may *never* warn teachers of improper or inappropriate behavior. Worse, the Court of Appeals opinion prohibits university administrators from even criticizing or disagreeing with their faculty members. If all such warnings and expressions of disagreement are to be construed as prior restraints, requiring a compelling state interest to justify them, this is tantamount to saying that no warnings or even strongly worded responses may be given, and that administrators respond at their peril to attacks by teachers.

A distinction is drawn in the Court of Appeals opinion between the analysis to be applied in situations where some allegedly retaliatory action was taken and where there was an exchange of correspondence but no action was taken. "[W]e must first note the significant difference in legal treatment which must be accorded plaintiffs' claim of unconstitutional restraint and plaintiffs' claims of retaliatory actions." Court of Appeals opinion, App. A24. With a passing acknowledgment to the cases that hold that conduct that impairs the efficiency of public service may be unprotected, the Court of Appeals goes on to say that:

> "On the other hand, no case has held that any justification can be offered with respect to actions taken to suppress or prevent criticism. (footnote omitted) It has always been recognized that there is a vast difference between state action which can be considered a form of prior censorship and action which holds the individual responsible once the speech or activity is concluded."

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21. Court of Appeals opinion, App. A25.

Court of Appeals opinion, App. A25, citing *Near v. Minnesota*, 283 U. S. 697, 713-14 (1931).

Prior restraint has traditionally been defined as a predetermined judicial prohibition restraining specified expression.[22] The "classic mold" of prior restraint involves a "prior injunction against publication".[23] Before "prior restraint" analysis is appropriate it must be shown that official sanctions may be imposed merely for violation of the order that constitutes the restraint without regard for the lawfulness or protected nature of the underlying expression that is asserted to be unlawful,[24] or that a public officer has the authority to prohibit speech based on its content.[25]

The Court of Appeals here directed the District Court to apply prior restraint analysis to defendants' specific, ad hoc, *after-the-fact* protests against certain conduct by specific faculty members. Such protests clearly are not appropriate for prior restraint treatment. They were not judicial orders, nor were they administrative orders. They

22. *See, Nebraska Press Association v. Stuart*, 427 U. S. 539 (1976); *Near v. Minnesota*, 283 U. S. 697 (1931); *Bernard v. Gulf Oil Co.*, 619 F. 2d 459 (5th Cir. 1980), *cert. granted*, 101 Sup. Ct. 607 (1980); *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975), *cert. denied*, 427 U. S. 912 (1976); Litwack, *The Doctrine of Prior Restraint*, 12 Harv. C. R.-C. L. Rev. 519, 520 (1977). Orders of administrative agencies may also be subject to prior restraint analysis. *See, Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U. S. 167 (1976).

23. *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97, 101 (1979).

24. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (7th Cir. 1975), *cert. denied*, 427 U. S. 912 (1976); *Bernard v. Gulf Oil Co.*, 619 F. 2d 459 (5th Cir. 1980), *cert. denied*, 101 Sup. Ct. 607 (1980); *Herschkop v. Snead*, 594 F. 2d 356, 368 (4th Cir. 1979).

25. *See, e.g., Brown v. Glines*, 444 U. S. 348 (1980).

were, at most, statements of the President's view that activities in which plaintiffs had already engaged may be considered grounds for discipline. No consequences followed from his statement of his view. The affected faculty were free to disagree and, in fact, did disagree quite vigorously. Most importantly, they were not, by the receipt of the President's letters, restrained from raising as a defense to any disciplinary action under the collective bargaining agreement, an argument that their speech or conduct was constitutionally protected.

As the Court of Appeals acknowledged, once the label of "prior restraint" is attached to the challenged action, it may be constitutionally permissible only in "exceptional" cases.[26] In holding that ad hoc expressions of disagreement with faculty or individual warnings to them with regard to their misconduct may be labeled prior restraints, the Court of Appeals has, in effect, held that the state as employer may not protect its interest in the efficient functioning of its educational institutions. If this analysis is permitted to stand, educational administrators will be unable to carry out even the most routine internal operating procedures and daily personnel affairs. Criticism of, or even a response to, a faculty member's actions will, under the Court of Appeals' analysis, be construed as an unconstitutional prior restraint. The Court of Appeals opinion will thus inhibit the free and lively exchange of ideas that the First Amendment was designed to encourage.

The Court of Appeals additionally found that the President's communications with the faculty should be ex-

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26. *Near v. Minnesota*, 283 U. S. 697, 716 (1931). Indeed, it may be that prior restraints, under current law, may only be justified, if at all, in cases of obscenity (*Freedman v. Maryland*, 380 U. S. 51 (1965)) or direct, immediate and grave harm to life or national security (*New York Times Co. v. United States*, 403 U. S. 713 (1971) (*per curiam*)).

amined for their "chilling effect".[27] The Court's extension of "chilling effect" analysis beyond formal statutes, regulations or rules would result in a serious interference in the administration of educational institutions and would involve the federal courts in the constant examination of informal memoranda and letters written to address issues of university policy or to express personal opinion. University administrators will be unable to rebut or even comment on the inappropriate or disruptive behavior of the faculty without inviting a federal lawsuit because the recipient of the criticism now feels intimidated from continuing in his behavior.

The chilling effect label is used in two situations: 1) to permit a plaintiff who has not been sufficiently injured under traditional notions of standing to seek a declaratory judgment that expressive activity in which the plaintiff

27. The Court of Appeals opinion reflects considerable confusion on the meaning and use of the concepts of "prior restraint" and "chilling effect". This confusion appears to stem from a failure to differentiate between these words as terms of art and their facial meaning. "Chilling effect" analysis is distinguished from "prior restraint" analysis in that the latter is the label used to describe situations in which punishment may be imposed without an opportunity for a ruling on whether the restriction on speech is constitutional or in which the speaker is prohibited from speaking, not just punished after doing so. A "chilling effect", however, may exist where although there is an opportunity to raise the unconstitutionality of the sanction as a defense, the inhibition against speaking is great. While such a "chilling effect" may result in a failure to speak, and may therefore be considered a restraint prior to speaking, it is to be distinguished from formal "prior restraint" analysis. Likewise, all statutes or regulations that cannot pass constitutional muster because they restrict free speech may in some sense "chill" speech as that term is commonly understood. However, "chilling effect" as a term of art is a label used for analytical purposes to justify the creation of standing to challenge a statute or to refuse to give effect to a statute that is impermissibly overbroad or vague in a manner that may intrude upon First Amendment freedoms. The grant of certiorari in this case would be appropriate to clarify these concepts.

seeks to engage is improperly prohibited by a statute or regulation;[28] and 2) to allow a person to raise the overbreadth or vagueness of a statute or regulation to which that person is subject.[29] The doctrine was formulated to focus directly on the need for precision in legislative drafting to avoid conflict with First Amendment rights.[30]

It is for this reason that chilling effect analysis has been applied in decisions of this Court only to statutes, ordinances, rules, or regulations, not to the kind of ad hoc responses involved in this case.[31] This District Court found that plaintiffs in this case had not been disciplined nor had they suffered any damage as a result of receiving the allegedly inhibitory letters. There was no "policy" that could be examined for its overbreadth or vagueness. The District Court found, as a finding of fact, that plaintiffs were not inhibited from engaging in expressive activity. The Court of Appeals has not stated any reason why, in the absence of any injury to plaintiffs, the "chilling effect" doctrine should be extended to apply to the facts of this case.

As this Court observed in *Laird v. Tatum*, 408 U. S. 1 (1972), *rehearing denied*, 409 U. S. 901 (1972), in order to state a justiciable controversy on a theory that a governmental regulation has imposed a "chilling effect" on the

28. *See, e.g., Dombrowski v. Pfister*, 380 U. S. 479, 486 (1965), and *Broadrick v. Oklahoma*, 413 U. S. 601, 612 (1973).

29. *See, e.g., Arnett v. Kennedy*, 416 U. S. 134 (1974), *rehearing denied*, 417 U. S. 977 (1974), and *Keyishian v. Board of Regents of the University of the State of New York*, 385 U. S. 589 (1967).

30. *See, The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 845 (1970).

31. *See, e.g., Brown v. Glines*, 444 U. S. 388 (1980); *Arnett v. Kennedy*, 416 U. S. 134 (1974), *rehearing denied*, 417 U. S. 977 (1974); *Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548 (1973); *Broadrick v. Oklahoma*, 413 U. S. 601 (1973); *Grayned v. City of Rockford*, 408 U. S. 104 (1972).

plaintiff's expressive activity, more is required than mere allegations of a "subjective chill." On the contrary, in the cases in which plaintiffs have stated a constitutionally cognizable controversy, the challenged exercise of governmental power was "regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Id.*, at 11.

Moreover, the Court of Appeals' decision conflicts with the decision of the Court of Appeals for the District of Columbia Circuit in *National Treasury Employees Union v. Kurtz*, 600 F. 2d 984 (D. C. Cir. 1979).[32] In *Kurtz*, the D. C. Court of Appeals held that an action to declare unconstitutional a *formal memorandum* to all employees of an Internal Revenue Service office cautioning them not to disclose information about IRS activities did not present a justiciable case or controversy. The *Kurtz* court held that:

> . . . . [A]n official letter or memorandum, not promulgated through any rulemaking authority, should not lightly be deemed the foundation for a declaratory judgment to counter its "chilling" effect. 600 F. 2d at 988 (citations omitted).

The reasons for the development of the "chilling effect" doctrine simply do not support its extension to the facts of this case. The instructions of the Court of Appeals, requiring the District Court to apply "chilling effect" analysis, should therefore be reversed.

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32. Recent decisions of the Courts of Appeals for the Second and Seventh Circuits also incorrectly approve "chilling effect" analysis in cases of administrative responses to specific faculty members' expressive activity. *Aebisher v. Ryan*, 622 F. 2d 651 (2d Cir. 1980), and *Yoggerst v. Stewart*, 623 F. 2d 35 (7th Cir. 1980).

3. The result of the Court of Appeals' failure to require a *Pickering* balance in determining whether allegedly "chilled" speech is protected by the First Amendment, will be to require administrators to dismiss rather than warn employees when they fail to meet professional standards.

Even if chilling effect analysis were appropriate here, which it is not, for all of the reasons stated above, such analysis should still be subject to the balancing requirements articulated in *Pickering* and discussed above. The Court of Appeals here, in not requiring a *Pickering* balance, is in direct conflict with this Court as well as other courts of appeals.

It is at this point beyond question that a state-related educational institution has an interest in the efficiency of the services it provides that justifies greater restraints on faculty members' First Amendment freedoms than would be permissible in the absence of the employer-employee relationship. *See, Pickering v. Board of Education,* 391 U. S. 563 (1968). These interests are not lessened because the employer seeks to protect its efficiency without the necessity of firing the employee. Under the reasoning of the Court of Appeals, however, speech that may be unprotected under the *Pickering* analysis in a "retaliatory discharge" case, is somehow protected if the employer reprimands the employee rather than discharges him. We thus arrive at the absurd result of requiring administrators to fire disruptive employees rather than point out to employees their improper conduct in an attempt to remedy the problem short of dismissal.

The Court of Appeals stated that on remand the District Court should consider the "chilling effect" of defendants' actions but apparently concluded, as it did not find clearly erroneous the District Court's finding of disruption, that plaintiffs have no burden under the "chilling effect" analysis to prove that the allegedly chilled speech is protected under the *Pickering* balancing test. This is

contrary to the holding of other courts of appeals in similar cases, as well as contrary to reason.[33]

Two other courts of appeals that have specifically addressed the chilling effect argument in an employer-employee setting have stated that if a chilling effect analysis is appropriate, the district court must then engage in the *Pickering* balancing test to determine whether the "chilled" speech is protected, i.e., whether plaintiff has made out a First Amendment claim. See *Aebisher v. Ryan,* 622 F. 2d 651, 655 (2d Cir. 1980) and *Yoggerst v. Stewart,* 623 F. 2d 35, 39 (7th Cir. 1980). Where a disruptive effect of the expressive activity is shown, as it has been here, it is a somewhat startling result to hold that although the administrator may constitutionally discharge the employee in question, if the administrator instead warns the employee that continued disruption will be considered grounds for discharge, the administrator might then be found to have violated the employee's First Amendment rights.

As it is beyond question that the District Court found that plaintiffs' activities were sufficiently disruptive to remove them from the protection of the First Amendment,[34] the Court of Appeals has erred in its analysis of the law, an error that brings it into direct conflict with other circuits.

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33. The Court of Appeals opinion also states that the totality of defendants' conduct should be considered in evaluating plaintiffs' claims. It is clearly improper to weigh in this balance the conduct of defendants that has already been determined to be proper and not a basis for a First Amendment claim.

34. The District Court unequivocably stated that "the tactics employed by the plaintiffs unquestionably had a disrupting effect on the University's primary mission—education and the advancement of the Arts and Sciences." Court of Appeals opinion, App. A27. The findings were not held by the Court of Appeals to be clearly erroneous.

4. The Court of Appeals has sanctioned the intervention of federal courts in the day-to-day administration of a university, in contravention of the limitations of Article III, by approving the imposition of "judicial censure" and the granting of advisory opinions.

The decision of the Court of Appeals has provided a forum for the continual harassment of university administrators: faculty who disagree with administrative actions may, although otherwise unable to state a cause of action, seek "judicial censure" in the federal courts of allegedly unconstitutional conduct.[35]

In this case, the Court of Appeals has endorsed the exercise of the federal judicial power to censure what plaintiffs describe as a "repressive atmosphere." The District Court found that the Administration's actions were neither designed to, *nor had the effect of,* suppressing plaintiffs' freedom of expression.[36] Nevertheless, the Court of Appeals would permit plaintiffs to try to prove a purely subjective chill that they feel existed on the Lincoln campus.

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35. Opinion of the Court of Appeals, App. A16: "However, we do not view this case as primarily one by faculty members seeking reinstatement. Many of the plaintiffs are faculty members who are already tenured, who remain on the Lincoln faculty, and who do not seek action of the court to remedy a personnel decision. Even Trotman may be reinstated through the arbitrators' awards, if affirmed, without the need for any action by the federal courts. Therefore, this action may be viewed as one in which plaintiffs seek *judicial censure* of a course of conduct which they consider as having violated their constitutional right to engage in spirited criticism of administrative policies with which they disagree. Even if there were no claims seeking reinstatement or damages, plaintiffs' claims would be viable since suits for declaratory or injunctive relief have long been acknowledged to be effective means to protect free speech rights and redress their violation." (Emphasis added.)

36. App. at A77.

The Court of Appeals decision will involve the federal courts in the day-to-day management of the University despite the traditional reluctance of federal courts to intervene in conflicts that arise in the daily operation of the public schools.[37] The impact of the Court of Appeals opinion on the defendants in this case, for example, will undoubtedly result in a reluctance by administrators to rebut strident criticism addressed to them by faculty members. They will be unable to provide appropriate warnings to faculty members and other employees whose allegedly "expressive" activities disrupt the University's educational mission or violate its collective bargaining agreement. The Court of Appeals opinion will foreclose the administrators of public universities as well as other public employers from exercising their own expressive freedom.

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37. *See, Wood v. Strickland,* 420 U. S. 308, 326 (1975), *rehearing denied,* 421 U. S. 921 (1975), and *Epperson v. Arkansas,* 393 U. S. 97, 104 (1968). Plaintiffs' claims of constitutional infringement include decisions about tenure, promotions, department chairmanships and even what motions are appropriate for discussion at faculty meetings. Court of Appeals opinion, App. A14.

CONCLUSION

For all of the reasons discussed above it is appropriate for this Court to grant a writ of certiorari to the United States Court of Appeals for the Third Circuit and to correct that Court's errors of law that are in conflict with decisions of this Court and decisions of other courts of appeals and that will have disastrous effects on the ability of university administrators to meet their primary responsibility: the education of university students.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 18 1981

No. 80-1580

IN THE

Supreme Court of the United States

October Term, 1980

LINCOLN UNIVERSITY, et al.,

Petitioners,

v.

C. JAMES TROTMAN, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2490

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA GUNN, THOMAS JONES, JULIUS BELLONE, DEFOREST RUDD, PETER F. HOFFER, DONALD PIERCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF, and LELAND SMUCKER

Appellants

v.

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, LINCOLN UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, and HERMAN BRANSON, individually and as President of Lincoln University

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-2133)

Argued: June 10, 1980

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

(Opinion filed November 25, 1980)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge.*

It is unfortunate that resort to the courts has been deemed necessary in a case of this kind. Almost all litigation between individuals has an emotional aspect for the parties. But when the controversy arises out of deep divisions in the academic community, as does this one, the judicial process seems particularly inapt. The academic process entails, at its core, open communication leading to reasoned decisions. Our society assumes, in almost all cases with good reason, that different views within the academic community will be tested in an atmosphere of free debate. It is the dialectic process which underlies learning and progress. In contrast this dispute, which pits the president and administration of a state-related Pennsylvania institution against at least a quarter of the faculty, has been attended by dismissal of a dissenting faculty member, disruption of classes, arrest of faculty members, attempted stifling of debate and other sorry incidents. The setting for this dispute is Lincoln University, which is described in one of the exhibits in the record as "the country's oldest college in continuous exis-

tence for the higher education of black students." However this dispute is ultimately resolved, the residue of bitterness will not soon be dispelled, and must inevitably impede the primary goal of an institution of higher learning. Although our judicial responsibility requires that we take jurisdiction of the issues and decide the case, we are cognizant, and we hope the parties are, that some other process of resolution would have been far preferable.

I.

The amended complaint was filed by fourteen present and former faculty members of Lincoln University[1] against Herman Branson, President of the University, the Board of Trustees,[2] and Lincoln University itself, a state-related institution in Chester County, Pennsylvania. Plaintiffs allege that in order to suppress faculty criticism of University policy, defendants discharged, failed to promote, and otherwise punished plaintiffs, and took action which directly infringed upon their right to freedom of speech. Plaintiffs also allege a number of other constitutional violations, including infringement of their right of association, assembly, due process, and equal protection of the law, but essentially plaintiffs recognize that their case must rise or fall with the free speech issue. Plaintiffs' amended complaint also alleges claims under the Pennsylvania Constitution, plaintiffs' employment contracts, and the collective bargaining agreement between Lincoln University and the Lincoln University Chapter of the American Association

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1. The original complaint was filed by seventeen faculty members. According to plaintiffs, three withdrew because they were no longer connected with the University. One of the fourteen remaining plaintiffs withdrew during trial for personal reasons unrelated to this dispute.

2. The district court held that the Board of Trustees is not an entity that can be sued as such. That holding is not on appeal.

of University Professors (LUC-AAUP), none of which were specifically discussed by the district court. The complaint sought compensatory and punitive damages as well as injunctive and declarative relief.

The case was tried before the district court without a jury, and at the conclusion of plaintiffs' case, the court granted defendants' motion to dismiss. The court concluded:

> [I]n my view of the evidence, there was a reasonable basis for every action complained of here, which was totally unrelated to the exercise by the plaintiffs of their constitutionally protected rights.
>
> * * *
>
> In sum, I feel that there was no attempt by the President of the University, the Board of Trustees or any members thereof, or anyone associated with the Administration of the University to suppress, stifle, chill or in any way inhibit the constitutionally protected activities of the faculty members.

On appeal, plaintiffs claim that the district court failed to apply the correct legal standards in determining whether plaintiffs' protected speech was suppressed or restricted by the defendants; that the court erroneously refused to permit plaintiffs to testify about the chilling effects of defendants' actions; that the court refused to give sufficient weight to two arbitration findings favorable to plaintiff Trotman on the issue of his dismissal; that several of the court's factual findings were clearly erroneous; and that the district court erred in denying plaintiffs a jury trial which plaintiffs first sought in their amended complaint.

For the reasons stated below we will reverse the judgment of the district court and remand the case for a new trial.

II.

The genesis of the controversy was President Branson's efforts to increase the student-faculty ratio from 12 to 1 to 20 to 1, which would have comported with guidelines promulgated by the Pennsylvania Department of Education, independent recommendations, and the practice at other Pennsylvania state-related institutions which had higher ratios than did Lincoln. This would have necessitated significant reductions in the size of the Lincoln faculty, and that faculty accordingly failed to agree to a Plan of Retrenchment proposed by Branson. On April 26, 1977, the faculty, on motion of W. T. Johnson, Chairman of the Chemistry Department, voted 46 to 10 at a faculty meeting to censure Branson and to ask the Governor to replace him. On April 28, 1977, Branson implemented his decision to send notices of termination to every faculty member, regardless of tenure, seniority, or likelihood of actually being terminated. These notices were sent pursuant to a faculty by-law requiring that each faculty member be given one year's notice before termination. By December 1977 all of the retrenchment notices were rescinded with the exception of the one to plaintiff Trotman, an outspoken critic of the administration.

The retrenchment notices led to widespread, heated faculty opposition. Such opposition took many forms, including speeches, meetings, letters to the editor, faculty resolutions and picketing. The response of the University, and particularly Branson, is the basis for the plaintiffs' claim that defendants' actions violated plaintiffs' constitutional rights. For purpose of analysis, such actions will be grouped into those involving alleged retaliatory actions and those involving more direct infringement on speech.

III.

A.

Retaliatory Action

1. *Dismissal of Trotman*

C. James Trotman was Chairman of the English Department in April 1977 when these events began. He began teaching at Lincoln in the 1967-68 academic year; his teaching contract was renewed the following year. In 1969 Trotman took an extended leave in order to take graduate courses at Columbia University Teachers College, obtaining a Doctor of Education Degree (Ed.D.) in English. He returned to Lincoln in 1973 and was named Chairman of the English Department in that year. If his contract had been renewed during the 1977-78 academic year, he would have been awarded tenure because of his length of service. He was, however, an outspoken critic of President Branson and the retrenchment program. He was removed as Chairman of the English Department on June 30, 1977, and by letter dated December 13, 1977 he was notified that he was terminated as of June 30, 1978.

Although the action was dismissed before defendants presented their case, their defense emerges through cross-examination and argument. Defendants claim, and the trial court found, that Trotman was fired because the University had no evidence that Trotman had acquired an earned doctorate in the field of English, and that any criticism of President Branson in which Trotman engaged was not a factor in Branson's decision to deny him tenure. Trotman claims he did not realize Branson thought the degree was in English as opposed to Education with a concentration in English, that the degrees are identical for teaching purposes, and that the degree question is a sham. Trotman filed a termination grievance for binding arbitration as required by the collective bargaining agreement between the faculty

and the University, which ultimately concluded with an award in his favor requiring the University to treat the 1978-79 academic year as though Trotman had, in fact, taught full-time in the English Department for all purposes including "the purpose of achieving de facto tenure."[3] This award is currently on appeal.

2. *"Retirement" of Edward Groff*

In November 1977, Edward Groff, a Professor of English, learned that he would have to undergo brain surgery. Groff was another active critic of the Branson administration. He sought to be placed on sick leave and was assured by University Vice President Wade that that presented no problem. Upon returning home on January 13, 1978, Groff found a letter from Branson, dated January 5, informing him that he was retired effective December 31, 1977. The difference between retirement and sick leave was significant, retirement resulting in lower income and loss of medical benefits and coverage. Although Wade told the Union contract administrator on January 12 and 13 that he understood that Groff did not want to retire and that a mistake had been made, Branson attempted to justify the administration's actions in a January 18, 1978 memorandum to faculty and trust-

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3. An initial arbitration award found that the notice of termination sent to Trotman as part of the general retrenchment notice to all faculty members did not constitute adequate notice that Trotman woud be dismissed because of his alleged lack of the necessary qualifications. The arbitrator further found that dismissal of Trotman pursuant to a valid retrenchment notice required the University to comply with the provision of its collective bargaining agreement that it make "every reasonable effort . . . to place [Trotman] in another suitable position."

In a subsequent arbitration proceeding, a second arbitrator determined that the University had not complied with the initial award since it failed to offer Trotman a position in the English Department although two part-time instructors were hired to teach his courses. Trotman was awarded back pay for the 1978-79 year and all other benefits which would have accrued to him had he been a member of the Lincoln faculty during that year.

ees. It was only after protest by faculty members in the next several weeks over Groff's "retirement" that Branson denominated the University action a misunderstanding and reinstated Groff.

The district court found that the "retirement" was not in retaliation for Groff's outspoken criticism of the administration, as plaintiffs alleged.

3. *Removal of Johnson from Chemistry Chair*

Plaintiff Johnson, originally appointed by Branson as Chairman of the Chemistry Department, was removed from that position by Branson in 1978, at the end of a tumultuous year in which Johnson was "in the forefront of the faculty dissidents and was quite outspoken in his criticism of President Branson." His removal prompted a petition signed by 25 faculty members who termed the action by Branson "a retributive action."

In this instance, unlike in the other two, the district court did not find a lack of connection between Johnson's criticisms and his removal as Chairman. Rather, the court held that Johnson's conduct undermined the "harmony and mutual respect which should exist between the head of the University and the Chairman of one of its academic departments," adding "the grossly offensive comments of W. T. Johnson cannot march under the banner of the First Amendment or of academic freedom."

4. *Arrests of Trotman and Farrell*

On September 1, 1977, Trotman and Alfred Farrell, another member of the English Department, were standing with other individuals in a classroom to protest the action of Gladys Willis, who had been appointed by Branson to chair the English Department, in assigning herself to teach a course formerly taught by Farrell. Thereafter both Trotman and Farrell were arrested by campus police, and Trotman was charged with disorderly conduct. Ultimately, the Board of Trustees decided not to press charges.

The district court found that Trotman and others demonstrated in Willis' classroom and created disruptions which prevented her from teaching class, and that Trotman's arrest did not violate his constitutional rights.

B.

Restrictions on Speech

1. *Bellone letter*

The faculty sought to censure Willis for reasons related to the assignment dispute. Branson refused to allow the faculty to vote on the censure motion at a faculty meeting of September 13, 1977. Plaintiff Bellone, as spokesman for the English faculty, made a censure motion at the October 1977 faculty meeting which Branson ruled out of order. Defendants contend that Branson's rulings were based on his belief that faculty by-laws required personal charges to be brought before the University's judiciary committee and not before an open faculty meeting.

On October 13, 1977 Branson sent Bellone a registered letter, which in pertinent part read:

> [Y]ou have moved that the faculty vote to censure your colleague and department chairman, Dr. Gladys Willis. . . .
>
> * * *
>
> We regard your continuing attempts to have this resolution voted on by the faculty most seriously.
>
> Please treat this as a warning that any further breaches of commonly-accepted academic principles of fair play will be considered cause for appropriate discipline, including termination of your employment contract at Lincoln.
>
> I am placing a copy of this letter together with your motion of September 13 in your personnel file.

Plaintiffs claim that Bellone was deterred from making the motion again, although no disciplinary action was taken against him. Subsequently, the faculty held a "divisional" meeting, in which the faculty met without President Branson in the chair. At this meeting, on November 15, 1977, the motion passed. The district court found Bellone "has suffered no harm from Dr. Branson's letter warning him that he considered the continuation of attempts to censure Dr. Willis at faculty meetings to be grounds for discipline. Under the University's By-Laws, a hearing before the judiciary committee, composed of fellow faculty members, is required before a tenured faculty member such as Bellone can be terminated, and a fair hearing is required before any lesser discipline can be imposed."

2. *Disciplinary Meeting on Communication*

At a faculty meeting on May 2, 1978, plaintiff Virginia Gunn criticized her department chairman, Joseph Rodgers, of the Languages and Linguistics Department. Later that same day Rodgers wrote a memo to the administration evaluating Gunn and criticizing her teaching abilities. Among the items mentioned by Rodgers was a reference to the "inordinate amount of time [Gunn spent] writing memos and seeking bones of contention." Eight of the plaintiffs wrote to Rodgers on May 16, 1978 accusing him of making "an unwarranted and personal attack" upon Gunn, whom they termed an excellent teacher. That letter was distributed to the faculty together with a copy of the Rodgers' evaluation of Gunn, which had been attached with Gunn's approval. Subsequently, Branson sent a letter to seven of the signers objecting, in strong terms, to their letter and distribution and requesting their attendance at a "meeting" with him and University counsel. The faculty members had not been advised in the letter that the University contemplated that this was a hearing from which discipline might result. When they learned that at the "hearing", they refused to

participate further. No disciplinary action was ever taken as a result of the meeting.

Plaintiffs claim that defendants' conduct in this connection had a chilling effect on them and caused some of them emotional stress. The district court found that "[i]t is traditional that communications regarding evaluations of teachers be kept confidential." Plaintiffs contend this finding is clearly erroneous, relying on "unrebutted testimony" that each faculty member may decide whether a confidential memo placed in his/her file ought to be released.

3. *Branson Letters Regarding Press Communications*

On October 6, 1975 Branson wrote to the LUC-AAUP bargaining committee criticizing three of the plaintiffs for allegedly inaccurate statements which had appeared in the West Chester Daily Local News several days earlier. Branson's letter read in part:

> [Plaintiffs] Mr. Jones, Mr. Pierce and whoever else are responsible for that October 3, 1975 article are guilty of violating these three principles: the article is viciously inaccurate; the article shows no restraint; and the article is not balanced or fair or just. Inasmuch as the violated principles are those of AAUP, the *University expects some action*. No school can permit itself to be so irresponsibly maligned. (emphasis added)

In a second incident, the Philadelphia Bulletin published a story on May 26, 1976, quoting two of the plaintiffs on the effect of a proposed administration plan to cut faculty by one-third. On June 7, 1976, Branson wrote plaintiff Winchester the following letter, with copies to the University's attorneys and the Chairman of the Board of Trustees:

> In the Philadelphia Evening Bulletin on Wednesday, May 26, 1976, you are quoted verbatim in a news story. A copy of the story is enclosed.

> Please check the statement attributed to you carefully. If this office does not receive a corrected statement from you by June 17, 1976, I shall interpret your failure to correct the statement as admission that what you are quoted as saying you did say.

Finally, on November 15, 1977 Branson wrote a letter to the University attorney which was placed in Plaintiff Pierce's personnel file. It stated in part:

> Again the Union has engaged in completely unethical behavior. Pierce called the Daily Local News Reporter and read the AAUP letter to him! This deserves a strong letter from you to AAUP Washington.

Plaintiffs assert they viewed the above letters as threats of punishment for speaking to the press and that on some occasions they were deterred from such protected activity.

The court held that the October 6, 1975 letter was not a threat and did not prevent plaintiffs from maintaining contacts with the press. The other two letters were not specifically addressed by the trial court.

4. *Telegram Regarding Faculty Picketing*

In late April 1978, faculty members, including most of the plaintiffs, announced their intention to conduct a picket or vigil during former President Ford's visit to the campus, the protest aimed at drawing attention to perceived problems at Lincoln. Plaintiffs had previously picketed the offices of the law firm representing the University on two occasions, and they had also picketed the office of the acting Board Chairman in Oxford, Pennsylvania.

On the night of April 25, 1978, preceding President Ford's visit of April 26, a number of the plaintiffs received this phone-delivered telegram at their homes:

> Lincoln University considers any faculty picketing during term of collective bargaining [sic] to be in

violation [sic] and unprofessional conduct, a cause for discipline up to dismissal.

J. Freedley Hunsicker, Jr.
Attorney for the University
Lincoln University
Lincoln University, PA 19352

Hunsicker testified at trial that the telegram was authorized and sent by Branson except for two grammatical errors not affecting the telegram's substance. Some plaintiffs picketed the next day but no disciplinary action was taken.

Plaintiffs contend the telegram bans all faculty picketing without regard to time, place, manner, or subject matter. Plaintiffs assert the telegram affected the content and nature of the ensuing picketing. Defendants claim the telegram was sent on Branson's belief that the picketing would involve issues exclusively controlled by the grievance resolution provisions of the collective bargaining agreement in effect at that time. They state that when the University counsel determined that such issues were not involved, no disciplinary action was taken.

The district court found:

> The University's objection to picketing by members of the faculty was based upon a good faith belief that picketing over matters subject to the contractual grievance procedures was unlawful. As for those to whom the telegram of April 25, 1978 was sent, they were not at all deterred from exercising their rights. They appeared on the scene carrying signs protesting the issuance of the telegrams.

C.

Other Alleged Unconstitutional Conduct

The actions referred to in the prior two sections do not represent an exhaustive summary of all of the allegations plaintiffs have made as to unconstitutional conduct

by the defendants, but they are representative of plaintiffs' claims. Additionally, plaintiffs allege that the Board of Trustees publicized a resolution condoning the arrest of Trotman without giving him an opportunity to be heard on the issue; the University has refused to promote plaintiffs Pierce, Bellone and Winchester because of their opposition to University policies and their active participation in the faculty union; the University reduced plaintiff Mary Farrell's status to that of part-time instructor instead of instructor, thereby removing her from the tenure track; Branson withheld plaintiffs' contracts for five weeks in retaliation for their picketing; John Ware, Acting Chairman of the Trustees, informed plaintiffs at an April 1978 Board meeting that they would be subject to dismissal if they spoke out; and Branson failed to offer the Chemistry chair to plaintiff Smucker, who was next in line, after Branson had wrongfully removed Johnson from the position. It is unnecessary for us to consider in any detail each of the numerous allegations in view of our disposition of this case.

IV.

A.

Most cases that have raised the free speech rights of faculty members in state-related institutions have arisen in the context of a claim that adverse administrative action was taken as a result of the faculty member's criticism of the administration or unwillingness to follow certain standards of mandated conduct, such as the salute to the flag. Suits seeking reinstatement have been commonly brought by professors denied tenure or teachers who have been dismissed allegedly as a result of their exercise of their First Amendment rights. The focus in such cases has been directed to development of the standards for ascertaining the required nexus between the administrative action and the exercise by the faculty member of First Amendment rights.

Examination of a teacher's claim of retaliation based on engagement in protected activity requires a three step process. First, the plaintiff must show that s/he engaged in protected activity. *See Pickering v. Board of Education*, 391 U.S. 563 (1968). In that case the Court stated that "the interests of the [employee] as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *id.* at 568, and held that comment on matters of legitimate public concern by public school teachers is ordinarily protected activity. Second, a claimant who demonstrates that the activity was protected must then show that the activity was a substantial or motivating factor in a decision or action taken against the claimant. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). Third, the defendant can still defeat plaintiff's claim by demonstrating that the same action would have been taken even in the absence of the protected conduct. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17 (1979); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. at 287. Put in another way, the employee can prevail only if the court finds that but for the protected activity, the employee would not have been removed. Note, *Free Speech and Impermissible Motive in the Dismissal of Public Employees*, 89 Yale L. J. 376, 377, 383-84 (1979).

The district court viewed this case as presenting essentially the issue of the claimed retaliation and referred to the aforesaid model in its discussion. Had plaintiffs only requested relief from adverse employment decisions, and had the court followed the appropriate paradigm without legal error, then plaintiffs would have the heavy burden of proving that the district court's adverse findings on the relevant factual issues as to the reasons for the administrative actions complained of were "clear-

ly erroneous." As noted in Part III, the district court found that most of the administrative actions were taken for reasons unrelated to the criticisms of administrative action expressed by particular faculty member.

However, we do not view this case as primarily one by faculty members seeking reinstatement. Many of the plaintiffs are faculty members who are already tenured, who remain on the Lincoln faculty, and who do not seek action of the court to remedy a personnel decision. Even Trotman may be reinstated through the arbitrators' awards, if affirmed, without the need for any action by the federal courts. Therefore, this action may be viewed as one in which plaintiffs seek judicial censure of a course of conduct which they consider as having violated their constitutional right to engage in spirited criticism of administrative policies with which they disagree. Even if there were no claims seeking reinstatement or damages, plaintiffs' claims would be viable since suits for declaratory or injunctive relief have long been acknowledged to be effective means to protect free speech rights and redress their violation. Although the district court did conclude that plaintiffs' rights were not abridged, it is not apparent from the district court's opinion that the court separately considered plaintiffs' claims for declaratory and injunctive relief. To evaluate these claims, it is necessary first to analyze whether plaintiffs were engaging in protected activity and whether they have shown that defendants' actions infringed upon their rights.

B.

That much of the activity engaged in by plaintiffs falls within the protection of the First Amendment seems too evident to require any discussion except that acknowledgment of that fact was not expressly made by the district court. The activity involved was essentially criticism of Branson and his policies and methods,

which is "core" speech squarely encompassed within the First Amendment. It is not deprived of the protection of the First Amendment merely because it was strident.[4] The district court apparently focused on the content, i.e. merit or "legitimacy", of some of the speech involved. Thus it found that "Johnson's involvement *went beyond the pale of legitimate discussion* when, in a telegram to the Governor of Pennsylvania seeking Branson's removal as President of the University, he accused Branson of 'terribly irrational and destructive' conduct and characterized him as 'inhumane', 'vicious', 'vindictive' and 'arrogant with power given him by a weak Board.' " (emphasis added). Speech with far less claim to legitimacy than a telegram by a faculty member at a state-related institution to his Governor has been held to fall within the scope of the First Amendment, *see, e.g., Near v. Minnesota*, 283 U.S. 697 (1931), and any suggestion by the district court to the contrary was therefore erroneous. The possibility or even the likelihood that plaintiffs may have been misguided or obstinate, as a state investigative commission found, does not derogate from the status of their expressions as speech within the First Amendment.[5]

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4. As used in the text, the phrase "protection of the First Amendment" refers to embodiment of the language or activity within the term "speech", as distinguished from obscenity, which is accorded no refuge. Roth v. United States, 354 U.S. 476 (1957). To some extent, of course, the "protection" afforded by the First Amendment even to expressions falling within its scope can be diminished since, as noted at pp. 25-26 *infra*, consequences such as dismissal may flow under certain circumstances from the expression by public employees of what would ordinarily be fully protected speech.

5. In Cohen v. California, 403 U.S. 15, 24-25 (1970), the Court commented as follows:

> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values

Plaintiffs' picketing activity, while not pure speech like their petitions, letters, and comments to the press, "plainly involves expressive conduct within the protection of the First Amendment . . . ." *Police Department of Chicago v. Mosely*, 408 U.S. 92, 99 (1972). Although picketing and parading are subject to reasonable time, place and manner restrictions, they cannot be restrained on the basis of their content. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). *See Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941). However, there was one aspect of plaintiffs' activity which was entitled to no protection, and the district court correctly found that the disruption by Trotman and Farrell of Willis' English class is not constitutionally protected conduct. For that reason, it cannot serve as the predicate for any claim of constitutional deprivation. With that exception, the analysis of plaintiffs' claims must proceed to the second step, which involves a determination of whether defendants infringed upon plaintiffs' free speech rights.

In support of their claim of such infringement, plaintiffs point to Hunsicker's telegram authorized by Branson stating that Lincoln would consider faculty picketing "a cause for discipline up to dismissal"; actions

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NOTE 5 — *(Continued)*

which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why "[w]holly neutral futilities . . . come under the protection of free speech as fully as do Keats' poems or Donne's sermons," *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting), and why "so long as the means are peaceful, the communication need not meet standards of acceptability," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

by Branson which they characterize as threats of disciplinary action against faculty critics based on their speaking to the news media, such as the letter stating "No school can permit itself to be so irresponsibly maligned", and the scheduling of a disciplinary hearing following communications to the press by some plaintiffs; and the letter to Bellone warning that his continuing attempts to have the Willis censure resolution voted on "will be considered cause for appropriate discipline, including termination of your contract at Lincoln."

The district court treated these claimed infringements in two ways. With respect to the telegram which clearly was designed to inhibit the plaintiffs from exercising their First Amendment right to picket, the court found that the telegram was sent because of the University's good faith belief that the picketing would be over matters subject to the exclusive grievance procedures of the collective bargaining agreement. The court also found that the telegram on picketing, the letters regarding faculty members' contacts with the press, and other letters from Branson did not intimidate or restrain plaintiffs because they proceeded to picket nonetheless and because they continued to go to the press with their complaints. The court appears to have fashioned or accepted two defenses to free speech restraints, one based on the defendants' good faith and the other based on the plaintiffs' persistence. Neither defense has any support in the legal precedent nor any logic or policy to commend it.

Good faith has never been accepted as a justification for a constitutional violation, and there is even less reason to accept it when the violation alleged is restraint of free speech, one of the most fundamental of all constitutional rights. At most, good faith of the defendants would be relevant on the issue of damages, an issue the district court never reached. Individual defendants may have a good-faith immunity defense to personal liability

in damage actions, *see, e.g., Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), but the conduct which gave rise to the cause of action is not therefore legitimized or exculpated. As the Supreme Court recognized in *Owens v. City of Independence*, 100 S.Ct. 1398, 1416 (1980), qualified immunity is sometimes granted because of "overriding considerations of public policy" but this does not affect the question of the legality of the underlying governmental conduct, or its amenability to injunctive relief.

The other defense accepted by the district court here, that because plaintiffs persisted in their First Amendment activities they cannot complain of any constitutional violation, is similarly unacceptable. Such a defense would limit the protection of the First Amendment to those who are timid but eliminate it for those who are brave. It would indeed be ironic were we to hold that persons who are persevering and resolute, who overcome their inhibitions and fears to proceed on a course they believe constitutionally protected, would thereby lose the very protection which they rely on in asserting their rights. It may be that as a result of their determination or stamina they cannot show damage, or that the passage of time may alter the circumstances to obviate the need for injunctive relief, but there is no basis for denying them, at the least, the requested remedy of declaratory judgment if they can show entitlement thereto.

In any event, in this case plaintiffs produced evidence that defendants' actions were far from ineffective. Bellone testified he was "reluctant to make constructive criticisms within the [English] department" and did not again raise his censure motion after receiving Branson's letter warning him not to; Pierce testified he became "hesitant about even talking to the press"; Rudd testified that he tried to stay out of disputes as much as he could. There was testimony about a "sense of inhibition of one's

right to communicate with the press" and of unwillingness of professors to speak out about issues as they previously had done. The trial court never discussed this testimony.

Furthermore, the trial court repeatedly refused to allow plaintiffs and other faculty members to testify about their own chill and the inhibiting effect of defendants' actions.[6] In *Laird v. Tatum*, 408 U.S. 1, 11

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6. Objections were sustained, for example, to the following questions:

[To Plaintiff Bellone]: "[A]s a result of feeling threatened, have you not raised issues you otherwise would have?"

[To Professor Alfred Farrell, a non-plaintiff]: "Did these . . . events affect your judgment after them when you were considering whether or not to speak out or criticize the administration?"

"Following these events were you afraid to criticize the administration?" Plaintiffs' counsel then asked the Court "[A]m I clear that I can't ask him about this fear of retaliation?" THE COURT: "Yes. *Just tell us the facts that happened.*" (emphasis added).

"[W]hy aren't you a plaintiff in the lawsuit?"

"Were you concerned about any possible retaliation if you did speak out?"

[To Plaintiff Murray]: "As a result of [defendants' actions] did you refrain from criticizing the administration?"

"Do you believe you have suffered any consequences from your speaking out?"

[To Plaintiff Winchester]: "Do you feel now, and in the future, that you were in any danger if you speak out on the campus and criticize President Branson?"

"Are there activities that you will refrain from doing because of this fear?"

"Based on that fear, were there activities or conduct that you didn't engage in that you might have otherwise?"

[To Plaintiff Smucker]: "Are there activities or conduct on your part that you have not engaged in because you have been afraid of any retaliation?"

[To Plaintiff Pierce]: "Were there particular things that you did not do out of fear of retaliation?"

The trial court's policy toward this line of questions is reflected by the following colloquy between plaintiffs' counsel and the court:

Plaintiffs' Counsel: "I cannot ask him also what he did not do that he would have wanted to do out of fear of retaliation?"

The Court: "Yes . . . substantively it is not admissible."

(1972), the Court stated that "In recent years this Court has found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. *E.g., Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964)."[7] The Court has also noted that the "threat of sanctions may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Reprimands for statements by an employee which may be "construed to convey the message that like comments in the future would put [the employee] in danger of discharge" have been held to be of "constitutional significance." *Yoggerst v. Stewart*, 623 F.2d 35, 39 (7th Cir. 1980).

The evidence introduced by plaintiffs and that which they were prevented from introducing supported or would have been relevant to their claim of specific present objective harm, and hence presents a far differ-

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7. It is of some interest that the phrase "chilling effect" was first used in a case involving teachers' First Amendment rights. Justice Frankfurter wrote that:

> By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.

Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring).

ent claim than the "generalized allegations of chill" considered by this court in *Aiello v. City of Wilmington*, 623 F.2d 845, 857 (3d Cir. 1980). Since evidence of chill would be relevant to plaintiffs' claim that defendants' activities did in fact result in an unconstitutional restraint on protected speech and conduct, the court erred in excluding plaintiffs' proffered evidence.

The district court viewed some of Dr. Branson's letters as "no more than the exercise by Branson of the same right which plaintiffs purport to defend." If those letters merely constituted a defense by Branson of his position on retrenchment or other matters of public concern, or his rebuttal to plaintiffs' criticism, then they would indeed be entitled to the same protection. However, the district court overlooked the fact that those letters contained language sometimes explicitly and other times implicitly threatening discipline up to dismissal if plaintiffs continued to engage in speech or other protected activity such as picketing. They therefore do not stand on the same level as letters written by adherents of opposing viewpoints on an internal dispute. They were written by a state official in a position of authority with the power to impose discipline. They are therefore state action which must be exercised in compliance with the mandate of the First Amendment and cannot be dismissed as merely part of an academic debate. A similar view was expressed in *Aebisher v. Ryan*, 622 F.2d 651 (2d Cir. 1980), a case brought by two teachers who were reprimanded for commenting to the press about an incident of a student attacking a teacher. The Second Circuit reversed the action of the district court which had granted summary judgment on the grounds that the letters of reprimand were merely expressions of the employer's personal opinion or dissatisfaction. The court noted that "[w]here the use of coercive power is threatened, First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech." *Id.* at 655.

On remand, in considering whether defendants' actions created the effect or chill prohibited by the First Amendment, the trier of fact should take into account the totality of the conduct alleged, including letters and telegrams containing threats of discipline as well as the administrative or personnel actions such as terminations, failure to promote and failure to grant tenure to faculty members who were outspoken and critical of the administration's viewpoint. An analysis of each discrete allegation without considering the impact of all of the facts and circumstances in combination would overlook the proverbial forest for the trees.

C.

The claimed retaliatory actions appear in this case both as part of the evidence on which the allegations of First Amendment restraints are based and also as the predicate for separate claims for reinstatement, backpay and damages. In connection with these latter claims, plaintiffs contend that the trial court failed to follow the correct legal standards when it determined that plaintiffs were not the victims of unconstitutional retaliatory conduct. Before addressing the trial court's treatment of such claims, we must first note the significant difference in legal treatment which must be accorded plaintiffs' claim of unconstitutional restraint and plaintiffs' claims of retaliatory actions.

It can no longer be contended that public employees, even academics, have unlimited right to engage in speech and criticism without being subject to sanctions. As we noted above, although the Court has reiterated on numerous occasions that persons in public employment are not constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy to comment on matters of public interest, the Court has also cautioned that the public employee cannot engage in activity that impairs the efficiency of such public service.

See Pickering v. Board of Education, 391 U.S. at 568. Obviously, defendants must be given their opportunity to show that plaintiffs' speech and actions in this dispute fell within the range of conduct which has been held to justify administrative sanctions. On the other hand, no case has held that any justification can be offered with respect to actions taken to suppress or prevent criticism.[8] It has always been recognized that there is a vast difference between state action which can be considered a form of prior censorship and action which holds the individual responsible once the speech or activity is concluded. *Near v. Minnesota*, 283 U.S. at 713-14; *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring); *id.* at 733 (White, J., concurring).[9] As we noted in *Alderman v. Philadelphia Housing Authority*, 496 F.2d 164, 170 (3d Cir. 1974), "the government must offer compelling proof that a prior restraint is essential to a vital government interest."

In contrast to the restraint situation, the courts have held that defendants can offer various justifications to support retaliatory action against an employee for his or her speech. Criticism of a superior which destroys the needed close working relationship has been held to justify dismissal of the subordinate. *Arnett v. Kennedy*, 416

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8. In this case plaintiffs allege that defendants' restraints were directed to specific instances of criticism. We do not intimate that a University or other public employer cannot properly promulgate a general rule giving notice that employees who engage in conduct which causes disruption are subject to disciplinary action. Whether such action, when taken as a result of expressions within the scope of the First Amendment, improperly trenches on the constitutional rights of the employees requires an *ad hoc* decision.

9. We need not consider the possible justification based on national security since no such issue appears in this case. *See, e.g.*, United States v. Progressive, Inc., 467 F.Supp. 990 (W.D.Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (enjoining on national security grounds publication of article explaining how to construct a hydrogen weapon).

U.S. 134 (1974); *Sprague v. Fitzpatrick*, 546 F.2d 560 (3d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).

It is particularly important that in cases dealing with academia, the standard applied in evaluating the employer's justification should be the one applicable to the rights of teachers and students "in light of the special characteristics of the school environment", *see Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), and not that applicable to military personnel who must meet the "overriding demands of discipline and duty." *Parker v. Levy*, 417 U.S. 733, 744 (1974). *Cf. Gasparinetti v. Kerr*, 568 F.2d 311 (3d Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (police officers). In an academic environment, suppression of speech or opinion cannot be justified by an "undifferentiated fear or apprehension of disturbance", *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 508, nor by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. Instead, restraint on such protected activity can be sustained only upon a showing that such activity would " 'materially and substantially interfere with the requirement of appropriate discipline in the operation of the school.' " *Id.*

The trial judge in the case *sub judice* departed from this standard when he stated: "[A] public employee's speech . . . is not protected by the First Amendment if it has a *potentially disruptive* impact on the public employer" (emphasis added). The trial court relied on our decision in *Roseman v. Indiana University of Pennsylvania*, 520 F.2d 1364 (3d Cir. 1975), *cert. denied*, 424 U.S. 921 (1976), in support of the "potentially disruptive" standard.[10] In our subsequent decision in *Sprague*

10. The primary holding in the *Roseman* case, that no protected speech was involved because the speech was made privately rather than in public, was specifically overruled in Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16 (1979), holding that private communications do come within First Amendment protection.

v. Fitzpatrick, we discussed the balance which the Court enunciated in *Pickering v. Board of Education*, *supra*, and said, "The key question under *Pickering*, however, is whether the employment relationship has been seriously undermined . . . If the arousal of public controversy *exacerbates the disruption of public service*, then it weighs against, not for, first amendment protection in the *Pickering* balance." 547 F.2d at 566 (emphasis added). See also *Porter v. Califano*, 592 F.2d 770, 773 (5th Cir. 1979), where the court, in reversing summary judgment for defendants in a suit by a clerk-typist suspended for writing a letter sharply critical of her superiors, stated that at minimum the state must "clearly demonstrate that the employee's conduct substantially and materially interferes with the discharge of duties and responsibilities inherent in such employment." In any event, we do not find that the district court's alleged error in the selection of the standard would alone warrant reversal since the district court did find that the tactics employed by the plaintiffs "unquestionably had a disrupting effect on the University's primary mission — education and the advancement of the Arts and Sciences," and this finding satisfies even the more stringent standard of actual disruption which plaintiffs would apply.

On the other hand, the district court did err in placing the burden on plaintiffs to show that the defendants' alleged retaliatory action would not have taken place "but for" the occurrence of the protected conduct. The district court stated:

> The *ultimate burden will be on the plaintiff* to show not merely that impermissible factors entered into the retaliatory decision or action, but also that "but for" the protected conduct the action would not have been taken. (emphasis added)

The correct formulation is precisely the opposite. The *defendant* has the burden of proving by a prepon-

derance of the evidence that the challenged retaliatory action would have occurred anyway, even had the constitutionally protected activity not taken place. *Givhan v. Western Line Consolidated School District*, 439 U.S. at 416-17; *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. at 287.

Defendants argue that plaintiffs' speech was so disruptive as a matter of fact that the erroneous allocation by the district court of the burden was harmless. In light of the numerous decisions of this court reversing judgments because the district court improperly allocated the burden of proof,[11] and because we cannot determine whether the same result would have been reached had the proper allocation been made, we will reverse the court's judgment for defendants on the retaliatory action claims.[12] We reach this decision in part because we have held that the court applied incorrect legal standards in adjudicating plaintiffs' claims of unconstitutional restraint of First Amendment rights and the evidence on retrial on those claims will be inextricably connected to the alleged retaliatory action.

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11. *See, e.g.*, Matter of Decker, 595 F.2d 185, 190 (3d Cir. 1979) (case remanded because "[i]t is not for this court in the first instance to apply the appropriate burden of proof to the evidence"); United States v. Hollis, 569 F.2d 199, 203-04 (3d Cir. 1977) (held that even though there was evidence in the record to support district court's finding that defendant was competent at time plea was entered, case remanded "for we conclude that the court erred in placing on [defendant] the burden of proving competence").

12. In view of our disposition of this matter, we do not reach plaintiffs' claim that certain of the district court's findings were clearly erroneous. We also do not find that the district court committed any reversible error in its treatment of the arbitrators' findings on Trotman's grievance relating to his dismissal.

V.

In addition to plaintiffs' numerous claims of infringement of First Amendment rights, plaintiffs also assert two claims of denial of due process. There is little merit to plaintiffs' claim based on the "meeting" to which some of the plaintiffs were called following release of the Gunn memorandum because plaintiffs were deprived of no liberty or property interest encompassed within the notion of due process as a result of that episode.

The second claim, based on the failure of the Board of Trustees to consider Trotman's appeal challenging his termination despite the fact that the collective bargaining agreement provides that a faculty member may appeal such a termination, may be more substantial. Plaintiffs claim that failure to follow procedural requirements established by the University's by-laws in a proceeding leading to termination violates Trotman's right to procedural due process. Since this was not discussed by the district court, we will withhold comment to give the court the initial opportunity to consider the claim.

VI.

The original complaint in this case contained no request for a jury trial; the amended complaint filed three years later did request a jury trial but the court granted defendants' motion to strike the request. No new issues were raised in the amended complaint sufficient to revive any right to jury trial and the district judge did not abuse his discretion in denying a jury trial. *See Walton v. Easton Corp.*, 563 F.2d 66 (3d Cir. 1977) (en banc). However, since we are remanding this matter for a new trial, the trial judge will have the opportunity, if the plaintiffs renew their motion, to reconsider whether to exercise his discretion in favor of granting a jury trial on the damage issues.

VII.

For the reasons set forth above, we will vacate the judgment for the defendants and remand the case to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

OPINION

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 78-2133

C. JAMES TROTMAN, et al.

v.

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY, et al.

INTRODUCTION

This is an action originally brought in June, 1978, by 17 faculty members or former faculty members of defendant Lincoln University of the Commonwealth System of Higher Education ("Lincoln" or "the University") alleging that various actions of the defendants, including the termination of plaintiff Trotman and the threat to discipline others were taken as part of a scheme to prevent or suppress faculty criticism of University policy, and as such violated the rights of plaintiffs to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. The plaintiffs sought declaratory, injunctive and compensatory relief. There was no demand for a jury trial.

The plaintiffs sought a preliminary injunction seeking the reinstatement of plaintiff Trotman, for which hearings were held on November 8, 13 and 15, 1978. The Court made no ruling on this request because Trotman withdrew his request for preliminary injunction in January, 1979.

Fourteen of the original plaintiffs amended their complaint on April 16, 1979, after retaining new counsel. The amended complaint raised no new factual issues; but added claims under the Pennsylvania Constitution, the individual employment contracts of the plaintiffs, and under the collective bargaining agreement between Lincoln University and the Lincoln University Chapter of the American Association of University Professors. (LUC-AAUP). The relief sought was similar, but plaintiffs included a demand for a jury trial. The defendants moved to strike the jury trial demand. After the parties briefed the issue, the Court on June 1, 1979, granted defendants' motion to strike the demand. *See Walton v. Eaton,* 563 F. 2d 66 (1977). The court heard the plaintiffs' evidence on June 21, 22, July 5, 6, and September 4, 5, 6, and 7, 1979. The plaintiffs, except for Virginia Gunn, Peter Hofer and Antonio Fuste (who has by stipulation of the parties withdrawn as a plaintiff without prejudice) testified and introduced 231 Exhibits in support of their case. The record also includes the three days of testimony from the preliminary hearing. The defendants have moved that the plaintiffs' case be dismissed under Rule 41(b) of the Federal Rules of Civil Procedure.

Under that rule "[t]he court as the trier of fact may then determine them and render judgment against the plaintiff . . ." .

The Court heretofore made general findings in favor of the defendants and herewith makes the following specific

FINDINGS OF FACT

1. Plaintiff C. James Trotman is a former Assistant Professor of English and Chairman of the English Department at Lincoln residing in West Chester, Pennsylvania, whose employment at Lincoln terminated June 30, 1978. During 1978-79 he taught as an Assistant Professor at West Chester State College, part-time in the fall term and full-term during the spring. He is teaching at West Chester as a full-time Assistant Professor at the present time.

2. Plaintiff Mary Farrell is a part-time Instructor in English at Lincoln University residing in Oxford, Pennsylvania.

3. Plaintiff Andrew Murray is Professor and Chairman of the Department of Religion at Lincoln University residing in Oxford, Pennsylvania.

4. Plaintiff Virginia Gunn has been a part-time Assistant Professor of Languages at Lincoln University residing in Nottingham, Pennsylvania. She did not testify at trial.

5. Plaintiff Thomas Jones is Professor and Chairman of the Department of History at Lincoln University residing in Oxford, Pennsylvania.

6. Plaintiff Julius Bellone is Assistant Professor of English at Lincoln University residing in West Grove, Pennsylvania.

7. Plaintiff Deforest Rudd is Professor and former Chairman of the Department of Chemistry at Lincoln University residing in Oxford, Pennsylvania.

8. Plaintiff Peter T. Hoffer is a part-time Assistant Professor of Languages at Lincoln University residing in Oxford, Pennsylvania. He did not testify at trial.

9. Plaintiff Donald Pierce is Assistant Professor of Mathematics at Lincoln University residing in Oxford, Pennsylvania.

10. Plaintiff Richard Winchester is Associate Professor and former Chairman of the Department of History at Lincoln University residing in Oxford, Pennsylvania.

11. Plaintiff William T. Johnson is Professor and former Chairman of the Department of Chemistry at Lincoln University residing in Glen Mills, Pennsylvania.

12. Plaintiff Edward B. Groff is Professor of English at Lincoln University residing in Oxford, Pennsylvania. He is on permanent disability leave from the University.

13. Plaintiff Leland Smucker is Associate Professor of Chemistry at Lincoln University residing in Neward, Delaware.

14. Plaintiff Antonio Fuste by stipulation of the parties has withdrawn from the lawsuit without prejudice.

15. The faculty at Lincoln University is represented "with respect to wages, hours and terms and conditions of employment" by the Lincoln University Chapter of the American Association of University Professors (LUC-AAUP), a public "employee organization" within the meaning of the Pennsylvania Public Employee Relations Act of 1970 (PERA), 43 P. S. § 1101.301(2).

16. The individual plaintiffs are "public employees" within the meaning of PERA, 43 P. S. § 1101.301(2).

17. LUC-AAUP and the University have been parties to negotiated collective bargaining agreements since 1973. Most of the events complained of in this lawsuit occurred during the term of the Agreement dated April 9, 1976 which terminated on June 30, 1978. That Agreement was

superseded by the current Agreement effective as of July 1, 1978, which by its terms will be in full force and effect until June 30, 1981.

18. Each of the plaintiffs who testified has been or is now either an officer of the LUC-AAUP or a member of one of its committees. Plaintiffs Jones, Johnson, Murray, Groff, Smucker, Winchester and Pierce are all officers of or members of the Steering Committee of "Friends of Lincoln University" or (FLU), the goal of which is a new president and Board for Lincoln. Plaintiff Bellone is a member and subscribes to the goals of FLU.

19. The collective bargaining agreements have provided two procedures for the resolution of grievances: one leading to final and binding arbitration; the other through faculty committees created under the Faculty By-Laws, leading to appeal to the Board of Trustees. The Agreements provide in relevant part:

"ARTICLE XIV—GRIEVANCE PROCEDURE

14.1 It is the declared objective of the parties to encourage the fair and equitable resolution of grievances. In order to effect a prompt and efficient resolution of grievances, the parties shall make available one to the other all known relevant facts so as to enable the parties to resolve grievances, in the interest of maintaining harmony and cordiality within the campus environment. *The parties further agree that except as otherwise specifically provided in this Agreement, the orderly processes hereinafter set forth shall be the sole method used for the resolution of grievances.* A grievance may be filed by an aggrieved member of the bargaining unit, an aggrieved group of members of the bargaining unit, or the LUC-AAUP. LUC-AAUP may present a policy grievance (one

which affects more than one person) at any step of the grievance procedure prior to arbitration.

14.2 (a) a 'grievance' is an allegation or complaint that there has been a violation, misinterpretation or improper application of the terms and conditions of this Agreement or the By-Laws of the Faculty of Lincoln University which have been incorporated into the Agreement; or of any complaint alleging improper, arbitrary or discriminatory enforcement of existing rules, regulations, practices, and/or procedures relating to wages, hours, terms and conditions of employment.

(b) the term 'grievance' shall not include:

(i) Complaints relating to the merits of the dismissal or suspension of faculty members, which matters are governed by the Lincoln University Faculty By-Laws, Article III, Paragraph 9.

(ii) Complaints relating to the merits of appointment, reappointment, promotions and tenure, which matters shall fall initially within jurisdiction of the initial standing committee on Promotions, Tenure and Severance (Faculty By-Laws, Article 1, paragraph 5(k)) and reviewable by the judicial committee (Faculty By-Laws, Article 1, paragraph (g)).

(iii) Complaints relating to the merits of allegations of infringement of academic freedom, which shall fall within the jurisdiction of the judicial committee (Faculty By-Laws, Article 1, paragraph 5(g)).

14.3 Any grievance for which redress is not specifically defined in the Lincoln University Faculty By-Laws or in Articles VIII or XII hereof shall be

subject to redress through the procedures outlined below, Steps 1 through 4." (emphasis supplied).

20. Defendant Lincoln University is a "public employer" within the meaning of PERA, 43 P. S. § 1101.301 (1).

21. Defendant Herman Branson is President of Lincoln University and its chief executive officer. Under the grievance procedures set forth in the agreements he has the authority to adjust grievances.

22. Defendant Lincoln University since July 7, 1972 has been a state-related university and part of the Commonwealth of Pennsylvania System of Higher Education. It is financed and supported in substantial part and operates under legislative enactments of the Commonwealth of Pennsylvania and under the Rules, Regulations and guidelines of the Department of Education of the Commonwealth.

23. Plaintiffs have named as a defendant the "Board of Trustees of Lincoln University" without identifying or serving the individual members. The "Board of Trustees" is not an entity by a description of the members of the governing body of Lincoln University whose power and authority are prescribed by the rules and regulations of Lincoln University, and the laws of the Commonwealth of Pennsylvania.

24. Lincoln's Board of Trustees is composed of 39 individuals. The individual trustees have not been named as parties defendant to the lawsuit.

25. When the University hired Dr. Branson as president in October, 1970, it had been operating at a deficit for several years.

26. Lincoln has had a balanced budget every year since 1971-72.

A. *History of dispute between plaintiffs and Lincoln's administration.*

27. This controversy has its roots in Lincoln's change in status from a private to a state related institution and the University's efforts since 1971 to reduce the size of the faculty and to upgrade it.

28. The student-faculty ratio issue has been debated at Lincoln since 1971. Independent evaluations of the Middle States Association of Colleges and Secondary Schools in 1972 and of McKinsey and Company in 1971 recommended that Lincoln, as a matter of survival, had to increase its ratio.

29. Lincoln's student-faculty ratio was at a level of 12 students to one faculty member in 1974-5. Lincoln's ratio was substantially lower than the student-faculty ratios at the sister institutions of Penn State, Pittsburgh, and Temple. The guidelines promulgated by the Department of Education, according to the April 2, 1976 letter of Jerome Ziegler, Commissioners of Higher Education, to W. T. Johnson were that for the undergraduate level, there should be a student-faculty ratio of 20:1 at the lower level and 24:1 at the upper level. Lincoln has had no graduate school.

30. The University, since 1971, has sought to increase its effectiveness. One of the policies has been to attempt to achieve a student-faculty ratio of 20 to 1. The plaintiffs' reaction throughout the 1970's has been to resist an increase in the ratio of students to faculty.

31. The University's Board of Trustees passed resolutions in 1975 and 1976 directing the administration to take action to reach a student-faculty ratio of 20 to 1 by September, 1978.

32. Dr. Branson, in seeking to implement the directive from the Board, proposed a Plan of Retrenchment to the Department Chairmen on January 15, 1976. The faculty refused to cooperate with the administration in achieving this goal and no progress was made.

33. Dr. Branson, in the winter of 1977, notified LUC-AAUP in a meeting that sufficient reduction in staff by the Fall of 1978 could not be accomplished through normal attrition and that the University intended to institute a personnel policy of retrenchment based on program curtailment as set forth in Dr. Branson's January 15, 1976 plan.

34. The LUC-AAUP's response to the president's initiative was simply that there was no need for retrenchment.

35. Dr. Branson sent several memoranda to the faculty advising them of the need for their cooperation in the retrenchment plan. The plan was to reduce the faculty to 60 full-time equivalent positions.

36. That there was a continuing stalemate is apparent from the faculty resolution (through the division chairmen) on April 11, 1977 protesting the plan of Dr. Branson.

37. On April 19, 1977, pursuant to the requirement of consultation under the collective bargaining agreement, Dr. Branson notified the faculty subcommittee on Promotions, Tenure and Severance (which subcommittee at that time was composed of Messrs. Johnson, Winchester and Murray—all plaintiffs herein) that he intended to institute the retrenchment plan. He advised them in writing that he proposed to send notices to all the faculty as required

by the University's Faculty By-Laws. He asked the committee to review his proposal and to respond with their comments by April 27, 1977. The reason notices were sent to all was because the plaintiffs refused to cooperate in determining the manner in which the reduction could be accomplished and thus those to be effected could not be identified.

38. Instead of seeking to cooperate or to negotiate or suggest any changes to or postponement of the plan on the issuance of the notices, the faculty subcommittee decided to take the dispute public and notified the entire faculty of Dr. Branson's proposal by memorandum dated April 21, 1977.

39. On April 26, 1977, the faculty, on the motion of plaintiff W. T. Johnson voted in a faculty meeting to censure Dr. Branson because of the retrenchment plan, and to ask Governor Shapp to replace Dr. Branson.

40. Plaintiffs Johnson, Jones, Pierce and Winchester designating themselves the "Faculty Action Committee" wrote an open letter to Governor Shapp published in the June 8, 1977 *Coatesville Record* asking that he request the trustees (i) to rescind the retrenchment notices; and (ii) to remove Herman Branson as President. These plaintiffs also asked that the Governor withhold state funds until the trustees complied.

41. The plaintiffs also asked the National AAUP in June 1977 to censure the University. The AAUP has not censured the University.

42. Governor Shapp convened a commission under Richard Gilmore to investigate the charges of the plaintiffs in the summer of 1978. The Gilmore Commission on one

day heard witnesses for the administration; on another day, those for the faculty.

43. The Gilmore Commission in its report on August 29, 1977 found:

> "It is to the faculty's discredit that their failure to respond comprehensively and constructively to the problems of staffing that dates back certainly as early as the McKenzie (sic) Report in March, 1973, precipitated the drastic action the administration saw as necessary to pressure the University's legal, contractual right to effect the faculty curtailment to the extent and within the time frame mandated by the Board of Trustees."

The Commission also found that the student-faculty issue was real.

> "[w]e recognize that the impetus for increasing the student/faculty ratio is driven by economic considerations and emanates from those who control or influence a substantial portion of Lincoln's revenue: the Pennsylvania Department of Education and at least one member of the Pennsylvania Legislature. Lincoln's Board of Trustees has no practical choice but to be responsive to what amounts to an insistence for improved cost effectiveness. Although the faculty may choose not to participate in the implementation of a retrenchment program, Lincoln's Board of Trustees has no such option."

44. After the Gilmore Commission made its Report, the plaintiffs intensified their efforts to find issues to force the rescision of the retrenchment notices and to force Dr. Branson's resignation.

B. *English Department Controversy; Arrest of Trotman; Efforts to Censure Gladys Willis in Faculty Meetings.*

45. The first such issue involved the English Department and Dr. Gladys Willis. The University in the summer of 1977 hired Dr. Willis to be the Chairman of the English Department, replacing plaintiff Trotman. A faculty meeting was held on August 24, 1977. Dr. Branson was not present, and had sought to cancel it. Nevertheless, the faculty carried on its own meeting. The faculty approved resolutions stating that the University had unlawfully hired Dr. Willis in violation of the Faculty By-Laws, that Dr. Willis had made course assignments that had not met with the approval of the majority of the members of the English Department, that she should be removed from the University, and that no new faculty should be hired without the approval of the members of the English Department, and that the old courses be restored. This action was taken on the floor of the faculty meeting even though the collective bargaining agreement provides the exclusive mechanism for the resolution of grievances. No grievances were ever filed on the subjects of the resolution.

46. The right to appoint department chairmen vests in the president, not the faculty (Faculty By-Laws Art. 11, Sec. 1). The right to select and direct faculty is that of the administration, not the faculty (see Section 4.2 of collective bargaining agreement), and the right to assign courses within a department vests, if there is a dispute, in the department chairman (Faculty By-Laws, Art. II, Sec. 1).

47. The plaintiffs and several others who disapproved of Dr. Willis engaged in acts of civil disobedience on August 30, September 1, and September 2, 1977. They claimed that Dr. Willis had no right to assign herself a

course which previously had been taught by Dr. Alfred Farrell. However, instead of seeking to resolve the issue by the grievance procedures, they engaged in demonstrations in Dr. Willis' classroom and, in the name of "academic freedom", created disruptions so she could not teach her class.

48. Plaintiff Trotman admitted that on September 1 he refused to leave the classroom when requested by the University police and was then arrested. Farrell was arrested in Dr. Willis' classroom on September 2, 1977 after University security personnel had announced the scheduled class that day was cancelled. By their conduct on these days, the plaintiffs seriously disrupted the work of the English Department and the University.

49. The arrests of Trotman and Farrell were highlighted in the news media. The Board of Trustees, through an *ad hoc* committee, set out to inquire into the dispute between the plaintiffs and the administration. On September 6, 1977, the trustees held a three-hour meeting in Lincoln's auditorium, during which any faculty member was permitted to voice his or her opinion about the state of affairs at Lincoln. No one was precluded from speaking and no limitation was set on the content of the remarks of the faculty. Approximately ten spoke.

50. At about this time, Dr. Wade, the University's Provost and Academic Vice President, inquired into the underlying dispute between Dr. Farrell and Dr. Willis, and after discussion the issue was resolved to the satisfaction of Dr. Farrell by reassigning the disputed course from Dr. Willis to Dr. Farrell.

51. The Board on September 18, 1977 adopted four resolutions on the faculty-administration dispute in general, and regarding the English Department in particular.

They resolved that because of the classroom disruptions the Lincoln police acted properly and with "ample justification in arresting Trotman and Farrell". But stating that they wished to act for the "best interests of the University", the Board authorized its counsel to drop charges against Trotman and Farrell. The Board also expressed its support of Dr. Branson, and stated that, in the matter of retrenchment, it would review any and all recommendations for termination.

52. Plaintiff Trotman objected because the Board did not hold a hearing before it authorized the dismissal of the criminal charges against him. Yet Trotman spoke at the information meeting of the Trustees and was not restricted in any way in what he said. Since the charges were dropped, Trotman has nothing to complain of. He received no discipline for his activity on September 1. Under the circumstances, the University had no duty under the First Amendment to have a special hearing for Trotman before the University withdrew its charges against him.

53. The controversy regarding the English Department continued however. A majority of the members of the English Department (such majority including plaintiffs Trotman, Bellone and Mary Farrell) refused to recognize Dr. Willis as Chairman of the Department until March 1978.

54. The controversy was stirred anew by the attempts of the plaintiffs to have Dr. Willis censured on the floor of the formal faculty meetings. Dr. Branson as chairman of these meetings refused to allow the faculty to vote on the censure motions, ruling them out of order. The plaintiffs contend that Dr. Branson's actions in conducting the faculty meetings violated their First Amendment rights.

55. The plaintiffs on September 13, 1977 circulated a motion of censure prepared by plaintiff Bellone. Because of confusion, the motion was never formally brought to the floor of the meeting.

56. Bellone did not present the motion at the next faculty meeting on October 4, 1977. Dr. Branson ruled it out of order stating that the motion should be brought before the Judiciary Committee. Dr. Branson wrote Bellone on October 13, 1977, putting him on notice that Dr. Branson viewed his action in seeking Dr. Willis' censure to be a "breach of professional ethics", warning him that further efforts to seek the censure of his department chairman would be grounds for Dr. Branson to initiate discipline. A copy of the letter was placed in Dr. Bellone's personnel file.

57. Bellone did not file a grievance over Dr. Branson's letter of October 13, 1977. Nor did he seek its removal from the personnel file under procedures available to do so under the collective bargaining agreement.

58. This "issue" provoked campus debate. The plaintiffs' and administration's sides are reflected in the October 1977 correspondence between Andrew Murray and Dr. Branson. Dr. Branson's view was that personal charges should, under the University's By-Laws, be brought before the University's Judiciary Committee and not before the open faculty meeting. The plaintiffs contended that the motion should be considered in the faculty meeting.

59. The plaintiffs, led by W. T. Johnson, sought again in the faculty meeting of November 8, 1977 to vote on the censure of Dr. Willis. Dr. Branson again would not allow the motion.

60. The plaintiffs called a "divisional meeting", which was not a formal faculty meeting, on November 15, 1977. It was attended by 42 faculty members, who elected their own chairman—Dr. Johnson. At this meeting, those present voted to censure Dr. Willis.

61. The plaintiffs then sought, in the December 13, 1977 faculty meeting, to have the censure of Dr. Willis placed in the faculty minutes by the device of reading a report from the November 15, 1977 divisional meeting. Dr. Branson ruled this out of order.

62. There is no constitutional obligation on Dr. Branson, the chairman of the faculty meeting, to recognize a motion to censure a faculty member; nor is there any contractual duty. The plaintiffs were free to express their displeasure with Dr. Willis by alternative methods and, indeed, did.

63. Plaintiff Bellone has suffered no harm from Dr. Branson's letter warning him that he considered the continuation of attempts to censure Dr. Willis at faculty meetings to be grounds for discipline. Under the University's By-Laws, a hearing before the judiciary committee, composed of fellow faculty members, is required before a tenured faculty member such as Bellone can be terminated, and a fair hearing is required before any lesser discipline can be imposed.

64. Another incident involving the plaintiff Bellone was Dr. Branson's October 27, 1977 letter to Bellone in which Dr. Branson stated that he had heard that Bellone had made a statement to students that Branson had taken certain university funds for himself. Dr. Branson asked for an explanation. The only explanation Bellone ever gave to Branson was that he had turned the matter over to his lawyer.

C. *The Trotman Claim.*

65. Plaintiff Trotman claims that the University violated his constitutional rights by terminating him as of June 30, 1978.

66. Trotman was first employed by Lincoln as an Instructor of English for the 1967-68 academic year. At the time he was hired, Trotman possessed a masters degree in education with an orientation towards secondary education from Pennsylvania State University.

67. Trotman's initial teaching contract was renewed at the end of the 1967-68 academic year, and consequently he remained at Lincoln as an Instructor of English for the 1968-69 academic year.

68. At the beginning of the 1969-70 academic year, Trotman left Lincoln in order to take additional graduate courses at Teachers College of Columbia University. Trotman remained at Columbia from September 1969 until September 1973, during which time he was not a full-time faculty member of Lincoln University.

69. At Columbia University, Trotman obtained the Doctor of Education Degree (Ed.D.), although his subject matter field at Lincoln was English.

70. In late 1971, while Trotman was working on his Ed.D. at Columbia, the University's Vice-President for Financial Affairs, Donald L. Mullett, met Trotman at Trotman's apartment house in East Orange, New Jersey. Trotman told Mullett at that meeting that he was working on his *Ph.D. in English* at Columbia, and Mullett reported that fact to President Branson. As a result of Mullett's report, President Branson wrote a letter to Trotman on December 1, 1971 which stated as follows:

> "Mr. Donald L. Mullett has just told me that you are near the completion of your Ph.D. in English. I do hope that you are planning to return to Lincoln and that you will give us a full report on the progress you have made and when you might be available."

Trotman never responded to this letter. More specifically, Trotman never told Branson that he was not, in fact, working on his Ph.D. in English.

71. Upon completion of his doctoral studies in Education at Columbia's Teacher's College, Trotman was reappointed to the Lincoln University faculty, effective September, 1973, as an Assistant Professor and made Chairman of the Department by President Branson on the incorrect assumption that Trotman had acquired a Ph.D. in English language and Literature from Columbia University. He remained in this position, pursuant to successive one-year contracts, until the end of the 1977-78 academic year. His teaching contract was not renewed for the 1978-79 academic year.

72. Mr. Trotman was aware, in 1973, that President Branson believed he had acquired a Ph.D. in English, yet Trotman never advised Branson prior to late 1977 that he did not, in fact, have a Ph.D. in English.

73. On April 28, 1977, President Branson sent a letter to Trotman. This was one of the retrenchment notices referred to above. (See Nos. 27-44). The letter stated as follows:

> "This letter is your notice of reappointment for 1977-78, subject to the general conditions herein noted. If your classes during the first two trimesters of 1976-77 (August to May) averaged fewer than 20 students, this letter also reminds you that the pro-

gram curtailment that Lincoln has been forced to institute may involve you. Hence, in all fairness, *this letter must also be viewed as a year's notice as required by Article III, Section 2 of the Faculty By-Laws warning that* under adverse circumstances, *the year 1977-78 will be your last year at Lincoln as a full-time teacher with your rank and compensation.* The University is hard at work to mitigate the effects of program curtailment and welcomes your aid." (Emphasis added).

74. Trotman was not reappointed to his faculty position for the 1978-79 academic year. Therefore, his employment at Lincoln terminated effective June 30, 1978. His formal and ultimate notice of termination was by letter dated December 13, 1977 signed by Dr. Branson.

75. Acquisition of tenure of faculty members at Lincoln is governed by the Faculty By-Laws. Article III, Section 6 of the Faculty By-Laws provides that

> "all faculty members without permanent tenure who have been employed full-time in the University in the rank of instructor, assistant professor, associate professor, professor, or any combination thereof, for a period of seven years shall be granted permanent tenure upon appointment for the following year."

Pursuant to this provision, Trotman would have acquired tenure had he been reappointed to a full-time faculty position for the 1978-79 academic year, since 1977-78 was his seventh year as a full-time faculty member in the appropriate ranks.

76. Article XII, Sec. 12.7 of the collective bargaining agreement between Lincoln and LUC-AAUP provides that the President of the University has final authority regard-

ing decisions about termination or nonrenewal of faculty members' contracts. The role of the faculty in tenure decision is only advisory.

77. Since his appointment as President of Lincoln, Dr. Branson has committed himself to improving the quality of the educational services it provides. Dr. Branson has always considered, and has stated clearly to the faculty on numerous occasions, that the most important aspect of this process of improvement is an upgrading of the quality of the faculty.

78. President Branson has announced on many occasions that it is the Administration's general policy not to award tenure to faculty members who have not demonstrated their competence by acquiring a doctoral degree in the faculty member's subject matter field. Mr. Trotman was aware of this minimum requirement. Indeed, he conceded that during his tenure as department chairman he had once recommended a faculty member be dropped because of the University's "rigid policy on doctorates".

79. On January 12, 1972, President Branson met with the Committee on Promotions, Tenure and Severance to discuss minimum tenure requirements. One of the *minimum* requirements articulated by Branson at that meeting, and in a written memorandum he submitted to the Committee at that meeting, was an earned doctorate in the faculty member's subject matter field.

80. The Committee on Promotions, Tenure and Severance unanimously approved President Branson's "minimum" tenure requirement of an earned doctorate in the subject matter field. In a memorandum dated February 8, 1972, which was distributed to the entire faculty, the Committee stated, in pertinent part, as follows:

"The Committee unanimously approved the following guidelines as its policy for recommending tenure and agreed that those guidelines should be shared with the Faculty as information.

1. Academic preparation.
   Minimum: An earned doctorate in the subject matter field."

81. Trotman's doctoral degree, an Ed.D., was not in his subject matter area, i.e., English. Rather, it was a doctoral degree in the field of education.

82. Dr. Branson learned for the first time in 1976 that Trotman did not have a Ph.D. in English, which was confirmed in the Fall of 1977 when he began final review of Mr. Trotman's file for purposes of making a decision concerning Trotman's tenure.

83. The Administration's review of Mr. Trotman's file for tenure purposes in the Fall of 1977 revealed that it contained neither a transcript of his doctoral program nor a copy of his doctoral degree.

84. The Provost and Vice President for Academic Affairs, Charles Wade, requested on October 21, 1977 that Trotman provide a transcript of his graduate work at Columbia in order to determine whether Trotman's Ed.D. program contained sufficient concentration in English Language and Literature (as opposed to education) to warrant the conclusion that Trotman be treated as though he had acquired an equivalent to a doctorate "in his subject matter field". Trotman did not comply with this request. Dr. Wade again requested the transcript on November 2, 1977.

85. Trotman consulted the Faculty Sub-Committee on Promotions, Severance and Tenure as to whether he

should comply with Wade's request for his doctoral transcript, and that Sub-Committee advised him on November 28, 1977 that he should provide the transcript to the Administration. Trotman, however, decided to ignore the Sub-Committee's advice and told the Sub-Committee he was willing to "take the risk . . . of being fired" for refusing to provide his transcript.

86. On November 28, 1977, Trotman did send the Administration a photocopy of a certificate from Columbia University that he had obtained the degree of Doctor of Education. He did not, however, forward a transcript as Dr. Wade had requested. The certificate which Mr. Trotman sent to Dr. Wade on November 28 did not state that Trotman's course of study had anything to do with English Language and Literature. Nor did it provide any information concerning the number of courses in English (as opposed to the number of courses in education) which Trotman had taken at Columbia's Teachers College, or any information concerning the extent of Trotman's achievements in the field of English Language and Literature as opposed to the field of education.

87. Since the University had no evidence that Trotman had acquired an earned doctorate in the field of English, Dr. Branson decided in December of 1977 that the University could not even consider awarding tenure to him. Therefore, on December 13, 1977, Branson wrote to Trotman to advise him that his teaching contract would not be renewed for the 1978-79 academic year. Dr. Branson's December 13 letter states, in pertinent part, as follows:

> "Vice President Charles Wade has informed me that you have refused to have supplied to the University an official transcript of your doctoral work at Teachers College, Columbia University, from which

you received your Ph.D. The Administration must conclude that you do not meet the essential criterion for a tenured position in the Department of English: an earned doctorate in that subject matter field.

In view of the fact that the Department of English is undergoing program curtailment and inasmuch as you were amply notified of this, the Administration regretfully informs you that you will not be offered a contract for 1978-79."

88. Any criticism of President Branson in which Mr. Trotman might have engaged was not a factor in Branson's decision to deny Trotman tenure. On the contrary, the only factor in his decision was the absence from Trotman's record of an earned doctorate in English Language and Literature.

89. Mr. Trotman's employment at the University terminated effective June 30, 1978. His annual salary during the 1977-78 academic year was approximately $16,500.

90. By letter dated June 22, 1978, the University offered Mr. Trotman a full-time position for the 1978-79 academic year as Coordinator of Placement with its Career Services Center at an annual salary of $16,500 plus applicable fringe benefits. Mr. Trotman rejected this offer of employment.

91. On August 22, 1978, the University offered Mr. Trotman a part-time teaching position for the fall semester, 1978 on the condition that he accept by August 25, the Friday before the commencement of the fall classes. Trotman, however, wrote to the University on August 25 that he would consider its offer. Since there was no timely acceptance, the University filled the position with another

applicant. Trotman purported to "accept" this part-time offer on August 30, but he had already accepted a job at West Chester State College.

92. Mr. Trotman obtained a position teaching three courses on the faculty at West Chester State College for the fall semester, 1978 at a salary of approximately $1,100 per month.

93. Despite his employment at West Chester, Mr. Trotman sought reinstatement at Lincoln by requesting this Court grant him a preliminary injunction.

94. By letter from counsel dated January 5, 1979, Mr. Trotman withdrew his application for preliminary injunction because he had a full-time position at West Chester. Yet on February 20, 1979, Mr. Trotman asked Arbitrator Peter Florey, Esquire, in yet another arbitration invoked by LUC-AAUP, to grant him reinstatement.

95. During the 1978-79 year Trotman was employed as a full-time faculty member at West Chester at a bi-weekly salary of $722.56, or $18,786.56 per year. His contract with West Chester has been renewed and he is teaching in the fall semester 1979 full-time as an Assistant Professor at West Chester.

96. There have been two arbitration awards concerning Trotman. Arbitrator Short in his award of April 17, 1978 (i) denied Trotman's claim for tenure based on his years in service; and (ii) ruled the University should try to find another position for Trotman. That award was never appealed. The University did offer Trotman another position (see No. 90) at a salary equal to his former salary, yet Trotman turned it down.

97. The second arbitration hearing was held on February 20, 1979 before Arbitrator Peter Florey. The issue

before him was whether under the collective bargaining agreement Trotman should have been rehired by the English Department in September 1978. The issue as to why Trotman was terminated on December 13, 1977 was not before him. His award, dated March 30, 1979, ruled that the University should have offered Trotman a full-time position for 1978-79 because it had hired two part-time teachers to teach English in the fall of 1978. He ruled that the University should have offered Trotman a full-time position in the fall of 1978. The Arbitrator ordered Trotman reinstated with tenure and back pay. He granted Trotman tenure even though Short in the earlier award had ruled it was beyond his authority to do so. The University has not reinstated Trotman, and has appealed this decision to the Court of Common Pleas of Chester County. The appeal is pending.

98. On September 1, 1977, Trotman and other members of the faculty intentionally interfered with and disrupted the scheduled class of Dr. Gladys Willis, the Chairman of the English Department. Mr. Trotman was arrested only after being asked to leave the classroom by the University police.

D. *The Branson Letter to Pierce.*

99. On March 30, 1972, Dr. Branson wrote Donald Pierce:

> "In preparing a statement for the Trustees, I have run upon a statement in your letter of March 27, 1972 which might be the source of deep concern. The third paragraph of that letter begins:
>
> 'In our session of March 11, 1972, with Secretary of Education for the Commonwealth of Pennsylvania

. . .' Am I to understand that a delegation of Lincoln faculty members met with the Secretary of Education without conferring with the Office of the President before seeking such a meeting? Moreover, you, Mr. Pierce, met with the Administration Group regularly without once mentioning that you had any plans for such a meeting. I believe that all members of the faculty knew that we have been carrying on very delicate negotiations with the State Government with Lincoln's future clearly at stake.

May I have a list of the faculty members who attended that meeting.

Very sincerely yours,

Herman R. Branson
President"

100. The plaintiffs allege that this letter violated their constitutional rights.

101. The negotiations that Dr. Branson referred to in his March 30, 1972 letter were those involving Lincoln's becoming state-related.

102. The March 30, 1972 letter was not disciplinary in nature.

103. Messrs. Pierce, Jones, Bellone and Winchester (all plaintiffs) answered Dr. Branson on April 5, 1972 as follows:

Dear President Branson:

Until we received your letter of March 30, 1972, it had not occurred to us that anyone would have

supposed that we, as citizens of this Commonwealth, did not have the right, indeed the professional obligation, to communicate with our elected or appointed state officials without first conferring with our employer.

We have no authorization to provide you with names of faculty members who attended the March 11 meeting. We believe that so long as we make no claim to speak for the University, and we did not make any such claim, any member of the faculty has the same right as any other citizen to question public officials at any time.

The substance of the paragraph in our March 27 letter beginning with "In our session on March 11 . . ."—which you regard as potentially a matter of grave concern to Lincoln—refers to Secretary of Education Pittenger's address to the general session of the Pennsylvania Division of the AAUP on that date.

104. The University has never sought to impose any discipline over this matter. None of the plaintiffs was intimidated by it. On the contrary, they have continued to contact various elected and appointed officials of Pennsylvania (including Governors Shapp and Thornburgh) with demands for Branson's discharge.

105. Although there existed, in March 1972, a grievance procedure under the Faculty By-Laws for those who feel that an administrative officer may have violated their rights, no appeal was ever taken.

106. At the time of this incident, the University was a private institution. There was no evidence that it acted under color of state law at any time prior to July 7, 1972.

E. *Statements Attributable to Pierce, Winchester and Jones in the News Media Concerning Labor Negotiations.*

107. Dr. Branson wrote the members of the LUC-AAUP bargaining committee which included Messrs. Pierce, Winchester and Jones (all plaintiffs) on October 6, 1975 and called them to task for making what he perceived inaccurate statements to the press concerning an impasse in the labor negotiations then pending.

108. The plaintiffs contend this letter violated their right to freedom of speech.

109. The plaintiffs never filed any grievance over this matter; nor did they file any unfair labor practice charge with the Pennsylvania Labor Relations Board.

110. One of the union statements in the news article was that the union was seeking a 10% increase. In fact, as found by a Fact-Finder appointed to mediate the dispute, the union demands were closer to 25%.

F. *Johnson is Removed as a Department Chairman in 1978.*

111. Dr. Branson originally appointed W. T. Johnson as Chemistry Department Chairman in 1974. He appointed a replacement in 1978. Johnson contends this was because of his outspoken criticism of the University and thus retaliation in violation of his First Amendment rights.

112. There is no extra compensation for being department chairman. Johnson suffered no loss of pay due to this action. Johnson never filed a grievance over his loss of the chairmanship.

113. It is important to a University, and Lincoln in particular, that a president have a good working relationship with a department chairman. It would be impossible for a good relationship to exist between Drs. Branson and Johnson if for no other reasons than Dr. Johnson has in public vilified Dr. Branson and asked for his ouster on countless occasions.

G. *Edward Groff.*

114. Plaintiff Groff contends that he was terminated from employment by the University in January 1978 because of his criticism of the University.

115. Groff was not able to teach his classes in the fall of 1977 because of a physical disability that later required brain surgery.

116. Because Groff had applied for and had been approved for total disability with Teachers Insurance and Annuity Association, Donald Mullett, Vice President for the University, advised Dr. Branson that the University should send Dr. Groff a letter acknowledging his retirement disability.

117. Dr. Branson wrote Groff on January 5, 1978, confirming that the University would consider that he had retired for disability reasons effective December 31, 1977.

118. It has never been Dr. Groff's desire to retire.

119. However, Dr. Groff did not call Branson and advise him of the error. Nor did he file a grievance. Instead he wrote a series of accusatory letters to the Trustees.

120. As soon as the University Administration learned that it was not Dr. Groff's intention to retire, it rectified

the mistake and placed Dr. Groff on disability leave status, as he desired.

121. The University also interceded in March, 1978 with the insurance carrier of its health insurance program to make certain Groff would continue to be covered even though he was no longer on the payroll. This action was taken on the very day Groff brought the problem to the University's attention.

H. *The University's Refusal to Promote Plaintiffs Pierce, Bellone and Winchester.*

122. The faculty subcommittee of the Committee on Promotions, Tenure and Severance recommended Donald Pierce for promotion to Assistant Professor in the Department of Mathematics in 1975, Jules Bellone for promotion to Assistant Professor in the English Department in 1975, and Richard Winchester for promotion to Professor in 1976, and has repeated its recommendations every year thereafter. The University has not promoted them.

123. All three of these plaintiffs contend that the University's refusal to promote them is because of their opposition to the University's policies and their active role on behalf of the LUC-AAUP, the faculty union.

124. Pierce, who received tenure before Dr. Branson was President, does not have a Ph.D.; his Master's Degree is not in Mathematics but in the teaching of mathematics, a degree designed for secondary school teachers. Indeed, Pierce's own department chairman in 1963 advised Pierce that promotion beyond the rank of Assistant Professor would depend on his acquiring a Ph.D.

125. Pierce does not have a Ph.D. and is not actively pursuing such degree.

126. Bellone does not have a Ph.D.

127. The only person who has been promoted to Associate Professor during Dr. Branson's tenure without an earned doctorate was Robert Emery, in the Music Department.

128. On June 30, 1978, LUC-AAUP filed an unfair labor practice alleging that the University's denial of promotion to Pierce, Bellone and Winchester on or about June 1, 1978 was due solely to their union activities, and therefore constituted an unfair labor practice. The LUC-AAUP withdrew the charge in February 1979 after it had been listed for hearing.

I. *Retrenchment Notices; Picketing; Telegrams before President Ford's Visit.*

129. The plaintiffs, acting in their union capacity, challenged the 1977 retrenchment notices under the contractual grievance procedures leading to arbitration.

130. Arbitrator J. Charles Short, Esquire, in an award and opinion dated April 17, 1978 found that the retrenchment notices were properly issued under the University's collective bargaining agreement and faculty by-laws.

131. The plaintiffs contend the retrenchment notices were sent for the purpose of retaliating against the free speech rights of plaintiffs.

132. The retrenchment plan and its application were initiated by the University in good faith for the purpose of achieving the goals set by the Board of Directors in 1975 to reduce the ratio of faculty to students.

133. The retrenchment notices were withdrawn in December of 1977 for all members of the faculty except Trotman.

134. The plaintiffs, under the leadership of the LUC-AAUP picketing committee of Johnson and Smucker,

picketed at the following locations on the following dates: at Broad and Chestnut Streets in Philadelphia outside the offices of Drinker, Biddle & Reath on November 17, 1977; at Drinker, Biddle & Reath again on December 15, 1977; outside Dr. Branson's office on January 15, 1978; and at the office of acting Board Chairman John Ware in Oxford, Pennsylvania on February 23, 1978.

135. The purpose of the picketing on November 11, 1977, as expressed by W. T. Johnson was to call attention to the problems at Lincoln, to encourage the ouster of Dr. Branson as President, to call attention to the fact that J. Peter Williams, Esquire, a member of the Drinker, Biddle & Reath law offices, was University counsel and also a member of Lincoln's Board, and to state that the University had lost a number of labor arbitrations. Dr. Johnson also testified that Dr. Branson's issuance of the retrenchment notices in April, 1977 "was the first gross evidence that Dr. Branson was not qualified" to be President.

136. The December 1977 picketing was directed to the same matters as the November 1977 picketing.

137. On January 12, 1978, the plaintiffs picketed Dr. Branson's office to protest the termination of Trotman, even though Trotman's claim for tenure had at that time been submitted to an arbitrator and a decision was pending. Dr. Johnson testified that there were other unjust actions which the plaintiffs were picketing over at this time, including "the firing of Groff", the "arrests of Professor Trotman and Dr. Farrell", "the firing of other people, the removal of Dr. Gelber, putting people on part-time".

138. The purpose of picketing John Ware's office in February 1978 as expressed in a flyer prepared by W. T. Johnson was to ask for Branson's ouster and to ask that Trotman be rehired. The flyer read: "John Ware [then

Chairman of the Board] Be Fair; Fire Branson and Hire Trotman".

139. With regard to the general pattern of picketing described above, the University informed the members of the LUC-AAUP in a meeting (held prior to President Ford's visit to the campus in April 1978) to discuss a new bargaining agreement that the University considered picketing over matters that were subject to the contractual grievance procedures to be unlawful under the union's contractual obligation that the grievance procedures be the exclusive means of settling issues.

140. The plaintiffs contend that defendants' sending of a telegram on April 25, 1978 to nine of the members was intended to discourage their First Amendment rights to peacefully picket.

141. On April 25, 1978, defendant Branson was advised that the plaintiffs intended to picket the next day on the occasion of the visit of former President Ford to Lincoln's campus. After consultation with J. Freedley Hunsicker, Jr., attorney for the University responsible for collective bargaining with LUC-AAUP, the University sent telegrams to the following plaintiffs: Bellone, Gunn, Hoffer, Johnson, Jones, Murray, Pierce, Rudd, Trotman and Smucker stating:

> "Lincoln University considers any faculty picketing during term of collective bargaining (sic) to be in violation (sic) and unprofessional conduct, a cause for discipline up to dismissal."
>
> J. Freedley Hunsicker, Jr.
> Attorney for the University
> Lincoln University
> Lincoln University, PA 19352

142. The telegram was sent because of the University's good faith belief, arrived at after discussion with counsel, that the picketing would be over matters subject to the exclusive grievance procedures of the collective bargaining agreement and by-laws, specifically over the retrenchment issue, the Trotman discharge, and other typical labor disputes and, therefore, are illegal.

143. None of the plaintiffs who received the telegram were intimidated by them. On the contrary, every one of them, except for Trotman, who attended a ceremony honoring his daughter, engaged in picketing during former President Ford's visit on April 26, 1978. The picket signs in the main protested the issuance of the telegrams the evening before.

144. After the picketing was reviewed by counsel, the University determined that the picketing was not over contract grievances and therefore did not warrant discipline. The University has never sought to impose any discipline on account of this or any other picketing.

145. The Union, acting through plaintiff Pierce, on May 4, 1978 filed a grievance challenging the picketing telegrams, but after the University responded on May 15, 1978 advising the union that the telegrams were not intended to be disciplinary, and advising that if there were to be any discipline it would have to follow a fair hearing as required under the agreement, the union dropped the grievance.

146. The union also filed an unfair labor practice charge with the Pennsylvania Labor Relations Board challenging the telegram, but withdrew the charge after the case was listed for hearing in February 1979.

147. The LUC-AAUP and the University entered into a new collective bargaining agreement effective July 1, 1978, which provides: "Faculty members shall not engage in picketing at any location over contract grievances".

J. *Mary Farrell Claim.*

148. Plaintiffs contend that the University listed Mary Farrell as a part-time faculty member in retaliation for her criticism of the University.

149. Mary Farrell has no Ph.D. She was hired in 1974 as an "Instructor in English and Director of the Reading and Writing Laboratory". She taught one English course and spent the remainder of her time in the laboratory. She was paid a full salary.

150. Mary Farrell has continued in the same duties at Lincoln up to the present time. She has always received a full salary.

151. On July 26, 1977, Dr. Branson issued Mary Farrell a contract adding the word "part-time" as a prefix to "instructor". The contract was signed "under protest". It reflected only a change of title to reflect that throughout her career Mary Farrell has taught only one course a year and therefore is part-time under the contractual definition.

152. The union filed a grievance over this issue for Mary Farrell, but dropped it.

153. While she is not a full-time faculty member, that has operated to her benefit. This is so because if she were registered full-time, she would be on the tenure track and because she does not have a Ph.D., she would have to be terminated under the University's rigid doctorate policies.

K. *The Conversion of Plaintiff Virginia Gunn's Status to that of a Part-Time Faculty Member.*

154. Plaintiff Virginia Gunn claims that she was reduced to part-time status as a result of statements she made at a faculty meeting on May 2, 1978. Plaintiff Gunn has failed to establish any evidence that she has engaged in constitutionally protected activity on May 2, 1978, or

at any other time prior to the University's decision to reduce her to part-time status at the end of the 1977-78 academic year. Plaintiff Gunn has failed to establish by a preponderance of the evidence that her expressions of criticism of University policy were a factor in the decision to reduce her to part-time status.

L. *Circulation of Rodgers' Letter.*

155. On May 16, 1978, plaintiffs Johnson, Winchester, Smucker, Trotman, Rudd, Murray, Groff and Jones wrote a letter to Joseph Rodgers and sent copies to all members of the faculty attacking Rodgers for his recommendations concerning Virginia Gunn. The letter enclosed a copy of Rodgers' May 2, 1978 memo to Charles Wade expressing his concerns about Dr. Gunn, a confidential memorandum.

156. On June 13, 1978, Dr. Branson wrote to all the signatories of the Rodgers letter (except for Trotman) stating that he considered that the letter and its distribution violated, *inter alia*, professional ethics, constituted interference with internal department matters, and violated long-standing traditions and contractual obligations of confidentiality.

157. The signatories were asked to come to the administration's offices on June 21, 1978. They were advised that the University's lawyer would be present. They came to the meeting. The University counsel characterized the meeting as a hearing. The signatories refused to make any statement. The meeting adjourned. No action was ever taken by the University.

158. It is traditional that communications regarding evaluations of teachers be kept confidential.

159. The circulation of the Rodgers' memo without his consent violated this tradition of confidentiality.

DISCUSSION

The free speech rights of public employees are not absolute. In determining whether a public employee's speech is constitutionally protected, "the interests of the [employee], as a citizen, in commenting upon *matters of public concern*" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U. S. 563, 568 (1968); *Givhan v. Western Line Consolidated School District*, 58 L. Ed. 2d 619 (1979).

Since the Supreme Court's decision in *Givhan, supra*, it does not appear that a public employee's speech must be made in a public forum in order to be protected by the First Amendment. Private expressions are also protected. *Givhan, supra.*

However, in order to qualify as "protected" speech, private expressions by a public employee must be on "matters of public concern", or on an "issue of general public interest". *Pickering, supra* at 568, 571-72; *Givhan, supra; Sprague v. Fitzpatrick*, 546 F. 2d 560 at 565 (3rd Cir. 1976); *Roseman v. Indiana University of Pennsylvania, at Indiana*, 520 F. 2d 1364 at 1368 and n. 11 (3d Cir. 1975).

Even if a public employee's speech is on matters of public concern, it is not protected by the First Amendment if it has a potentially disruptive impact on the public employer. *Roseman, supra*, at 1368; *Sprague, supra* at 565. Such a disruptive impact can occur as a result of the necessity for a harmonious working relationship between the plaintiff and the person whom he attacks in his allegedly "protected" speech. *Sprague, supra; Roseman, supra.* The employer's efficiency "may be threatened not only by the content of the employee's message, but also by the manner, time, and place in which it is delivered." *Givhan, supra* at n. 4.

Neither teachers, students, nor anyone else has an absolute right to use all parts of a public facility, such as the Lincoln campus, for unlimited expression purposes. Nor do those who want to protest or propagandize their views have a constitutional right to do so whenever and however they please. *Greer v. Spock*, 424 U. S. 828, 836 (1976); *Grayned v. City of Rockford*, 408 U. S. 104, 117-18 (1972); *Connecticut State Federation of Teachers, et al. v. Board of Education*, 528 F. 2d 471, 480 (2d Cir. 1976).

There is no constitutional obligation on the government to listen to, or to respond to public employee grievances. In the recent case of *Smith v. Arkansas State Highway Employees*, — U. S. —, 60 L. Ed. 2d 360 (1979), the Supreme Court in a *per curiam* opinion stated that "the First Amendment is not a substitute for the National Labor Relations Laws" and that "The First Amendment does not impose any affirmative obligation on the government to listen [or] respond" to employees' grievances. *Id.* at 363.

In order to establish a *prima facie* case, a plaintiff who claims he has been retaliated against because of his exercise of rights protected by the First Amendment must prove by a preponderance of the evidence: (1) that his speech or expression was on a matter of public concern; (2) that it would not potentially disrupt the public employer's operation or efficiency, either because of its content or because of the time, place, and matter in which it occurred; and (3) that the protected conduct played a "substantial part" in the employer's retaliatory action. *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U. S. 274, 97 S. Ct. 568, 575 (1977).

Only if plaintiff has established his *prima facie* case as set forth above, does the burden shift to the defendant to prove, by a preponderance of the evidence, that the same decision would have been reached or the same action taken even if the protected conduct had not occurred.

Mt. Healthy, supra at 575; *Givhan, supra* at —; *Perrine v. Montone,* 76 F. R. D. 444 (E. D. Pa. 1977).

The ultimate burden will be on the plaintiff to show not merely that impermissible factors entered into the retaliatory decision or action, but also that "but for" the protected conduct the action would not have been taken. *Givhan, supra; Coletti's Furniture, Inc. v. N. L. R. B.,* 550 F. 2d 1292 (1st Cir. 1977); *Williams v. Day,* 553 F. 2d 1160 (8th Cir. 1977); *Garza v. Rodriguez,* 559 F. 2d 259 (5th Cir. 1977).

As noted from the Bench at the conclusion of the plaintiffs' evidence, I am satisfied that there was no attempt by the President of the University, the Board of Trustees or anyone associated with the Administration of the University to stifle, chill or in any way inhibit the constitutionally protected activities of the faculty members. The best that can be said of the plaintiffs' case is that the Administration of the University acting through its President took exception to the time, forum or manner in which faculty members chose to address issues of concern to them. The plaintiffs seem to overlook the fact that the University spokesman as well as the members of the Board of Trustees have a right to discuss the same issues.

In any event, in my view of the evidence, there was a reasonable basis for every action complained of here, which was totally unrelated to the exercise by the plaintiffs of their constitutionally protected rights.

The plaintiffs have cited a number of events which occurred over several years as demonstrating that the University stifles free speech by members of the faculty. Included are the arrest of Trotman and Farrell. I have no difficulty in concluding that the sole motivating factor in these arrests was the disruption of Dr. Willis' English class by Trotman and Farrell which, of course, is not constitutionally protected conduct. Indeed, Trotman, Farrell and

the other members of the English Department had perfectly legitimate means of expressing their objections to the appointment of Dr. Willis as the Chairman of the English Department, and to her scheduling of classes instead of physically interfering with the holding of the class to the detriment of the students. Plaintiffs also cite the refusal of President Branson to entertain a motion to censure the English Department Chairman at a faculty meeting as further evidence of suppression of criticism. This ruling by Branson, who was then acting as Chairman of the faculty meeting, was based on a good faith belief that the proper forum to raise this issue was the faculty Judiciary Committee, and there was no intent on the part of Branson to deny any first amendment rights of the sponsor of the motion or any other member of the faculty.

The termination of Trotman stemmed solely from Trotman's failure to earn a doctorate in his subject matter field. This policy of limiting tenure to those who acquire a doctoral degree in the faculty member's subject matter field was in force since at least 1972 and had been rigidly followed. Thus, Trotman would have been terminated regardless of whether he had spoken out on campus issues. Moreover, Trotman's expression of criticism or dissent had such a disruptive impact on the operations and efficiency of the University, and particularly the English Department, that they are not protected by the First Amendment.

The Branson letter to the plaintiff Pierce dated March 30, 1972, in light of the circumstances, cannot be construed as a threat to the constitutional rights of the plaintiffs. It was merely an expression of concern that direct communication between faculty members and the Commonwealth's Secretary of Education, without the knowledge of the University's Administration, could jeopardize the then pending negotiations between the Common-

wealth of Pennsylvania and the University to have the University acquire state-related status. There was no threat of reprisal and no harm resulted. Moreover, the record shows that instead of restraining the free expressions of their views, as plaintiffs contend, the Branson letter of March 30 generated a prompt reply in which the faculty members involved asserted "the same rights as any other citizen" to communicate with state officials without first conferring with "our employer". It is obvious that the plaintiffs were not in any way intimidated by the March 30 letter.

It should also be noted that the record is completely devoid of any evidence that at the time of this incident, the University was anything other than a private institution, and thus was not acting under color of state law.

Plaintiffs also complain of a letter written by Branson on October 6, 1975, in which he challenged statements made to the press by members of the union's bargaining team during contract negotiations. They perceive this as a threat to their freedom of expression, but it was no more than the exercise by Branson of the same right which plaintiffs purport to defend. The October 6th letter is not a threat, and it certainly has not restrained the plaintiffs from going to the press with their complaints.

The removal of W. T. Johnson as Chairman of the Department of Chemistry presents a somewhat different picture. There can be no question that Johnson was in the forefront of the faculty dissidents and was quite outspoken in his criticism of President Branson, but Johnson's involvement went beyond the pale of legitimate discussion when, in a telegram to the Governor of Pennsylvania seeking Branson's removal as President of the University, he accused Branson of "terribly irrational and destructive" conduct and characterized him as "inhumane", "viscious",

"vindictive" and "arrogant with power given him by a weak Board".

Ours is clearly a case where the form "of public criticism of the superior by the subordinate seriously undermine[s] the effectiveness of the working relationship between them" (*Pickering, supra* at 570 n. 3), and thus outside the protection of the First Amendment. Other cases which hold that statements having a disruptive impact are not protected include *Sprague v. Fitzpatrick, supra; Roseman v. Indiana Univ., supra; Clark v. Holmes,* 474 F. 2d 928 (7th Cir.), *cert. denied,* 411 U. S. 972, 93 S. Ct. 2148, 36 L. Ed. 2d 695 (1973); *Duke v. North Texas State University,* 469 F. 2d 829 (5th Cir.), *cert. denied,* 412 U. S. 932, 93 S. Ct. 2760, 37 L. Ed. 2d 160 (1973). *See also Meehan v. Macy,* 129 U. S. App. D. C. 217, 393 F. 2d 822, *modified,* 138 U. S. App. D. C. 38, 425 F. 2d 469, 471, *aff'd en banc,* 138 U. S. App. D. C. 41, 425 F. 2d 472 (1968).

Given the degree of harmony and mutual respect which should exist between the head of the University and the Chairman of one of its academic departments, the grossly offensive comments of W. T. Johnson cannot march under the banner of the First Amendment or of academic freedom.

The plaintiff Groff contends that he was terminated from employment by the University because of his criticism of University policy. The fact is, he was not terminated. He was placed on disability retirement through a misunderstanding by the University's financial Vice-President. When it was brought to the University's attention that Groff wanted disability leave instead of disability retirement, action was taken promptly to properly reflect Groff's desired status. The letter which mistakenly acknowledged Groff's retirement was not written for the

purpose of retaliating against Groff, nor did it have that effect. I am convinced that this letter was not motivated by impermissible considerations.

Plaintiffs Pierce, Bellone and Winchester contend that they were denied promotion because of their outspoken criticism of the University's policies and because of their active role in the faculty union. Here again, these plaintiffs have failed to convince me that the exercise of their protected rights played any part in the decision to deny them promotions. Pierce and Bellone do not even qualify for promotion because they do not have an earned doctorate in their subject matter field.

The retrenchment notices were not designed to suppress criticism by plaintiffs. The notices were necessitated by the refusal of the faculty to cooperate in developing a plan to increase the student-faculty ratio.

Lincoln had a low student-faculty ratio, close to 9 students to 1 faculty member, in 1970. This compared unfavorably to the undergraduate student-faculty ratios at Penn State, Pittsburgh and Temple, which were greater than 20 to 1. The legislature and the Department of Education sought to remedy this. The State was understandably concerned that the taxpayers were getting a far worse return on their investment at Lincoln than at the sister institutions.

Two independent studies concurred that Lincoln should take steps to increase its student-faculty ratio—the Mc Kinsey & Company Report in 1971 recommended:

> "First it is essential that Lincoln increase its faculty-student [sic] ratio. The average number of students per class can be greatly expanded."

The Middle States Association of Colleges and Secondary Schools recommended in 1972 that Lincoln increase its faculty-student ratio to 16:1 or 17:1.

> "unless the faculty will make these efforts [to increase the student-faculty ratio], it is difficult to see how Lincoln University can hope to survive".

Accordingly, the University, since 1971, has sought to improve the student-faculty ratio. Dr. Branson kept the faculty fully advised of the University's desires in the monthly faculty meetings. The opposition to increasing the number of students has been led by the plaintiffs in this lawsuit.

The University's Board in 1975 and 1976 passed resolutions directing the President to take steps with a view to achieving a student-faculty ratio of 20:1 by September 1978. The President's attempts to obtain faculty cooperation were met with delay and obstruction. Finally in February of 1977, the President notified the LUC-AAUP that Lincoln might be forced to reduce its program by retrenchment, and accordingly, it intended to put all the faculty on one-year's notice of a possible termination at the end of the 1977-78 year. Because the collective bargaining agreement allowed faculty members to choose among themselves as to who would be retrenched, the administration believed that the safest method of proceeding on retrenchment was to notify all faculty members that the 1977-78 year could be the terminal year. The one-year notice was required under the Faculty By-Laws. The purpose of the notices was to attempt to remove all legal impediments to a retrenchment should it be required.

Dr. Branson in April 1977 also notified the faculty component of the Committee on Promotions, Tenure and Severance of the proposed notices. Instead of meeting with the President to discuss this, this subcommittee (composed of Messrs. Johnson, Winchester and Murray, all plaintiffs) reacted by openly advocating Branson's ouster. Their efforts took several directions. On April 25, 1977,

the faculty voted to censure Dr. Branson and wrote to Governor Shapp asking that he fire Dr. Branson and withdraw the notices of retrenchment. Several of the plaintiffs, calling themselves the "Faculty Action Committee", wrote Governor Shapp on June 2, 1977 asking that he request the Trustees to fire Dr. Branson, but this time adding the demand that the state withhold funds from Lincoln until the retrenchment notices were rescinded.

Governor Shapp convened a Commission under Richard Gilmore in the summer of 1978 to hear the charges of the plaintiffs. The Commission heard witnesses for the administration on one day; those for the charging faculty members on another. Two weeks before the issuance of the report, W. T. Johnson, throughout the leading spokesman for the plaintiffs, wrote Governor Shapp, advising him that the faculty would reject any finding by the Commission (regardless of what the report said).

The Gilmore Commission did issue a report on August 29, 1977 which stated:

> "It is to the faculty's discredit that their failure to respond comprehensively and constructively to the problem of staffing, that dates back certainly as early as the McKinsey Report in March, 1973 [sic] precipitated the drastic action the administration saw as necessary to preserve the University's legal, contractual right to effect the faculty curtailment to the extent and within the time frame mandated by the Board of Trustees."

The Commission also acknowledged that the student-faculty issue was real.

> "We recognize that the impetus for increasing the student-faculty ratio is driven by economic consideration and emanates from those who control or influ-

> ence a substantial portion of Lincoln's revenue: the Pennsylvania Department of Education and at least one member of the Pennsylvania Legislature. Lincoln's Board of Trustees has no practical choice but to be responsive to what amounts to an insistence for improved cost effectiveness. *Although the faculty may choose not to participate in the implementation of a retrenchment program, Lincoln's Board of Trustees has no such option.*" (emphasis added).

It is my conclusion that the retrenchment notices were not sent as a means of retaliation or intimidation, but were motivated solely by the desire of the University to achieve the student-faculty ratio goals set by the Commonwealth and the University's Board of Trustees.

The University's objection to picketing by members of the faculty was based upon a good faith belief that picketing over matters subject to the contractual grievance procedures was unlawful. As for those to whom the telegram of April 25, 1978 was sent, they were not at all deterred from exercising their rights. They appeared on the scene carrying signs protesting the issuance of the telegrams.

The complaint of Mary Farrell and Virginia Gunn are also completely without merit. There is no credible evidence that Dr. Branson's decision to reduce their designated status to "part-time" was based upon their criticism of administration policies or their comments on campus issues.

The events surrounding the circulation of the Rodgers letter is also cited by the plaintiffs as evidence of the defendant's scheme to deny faculty members their constitutional right to freedom of expression. Publicizing a critical evaluation of a teacher by her Department Chairman invades the privacy of the teacher as well as the evaluator,

and is contrary to traditional notions of professional responsibility. The Administration's reaction was premised on the genuine desire to maintain the confidentiality of such communications. The exercise by the plaintiffs of their constitutionally protected rights was not a factor in the decision to write the letter of June 13, 1978 inviting those involved to a hearing on the matter.

To the extent that findings of fact are made in this discussion which are not specifically enumerated under that heading above, they are, nevertheless, to be considered as such. These findings supplement the general findings heretofore made from the Bench.

In sum, I feel that there was no attempt by the President of the University, the Board of Trustees or any members thereof, or anyone associated with the Administration of the University to suppress, stifle, chill or in any way inhibit the constitutionally protected activities of the faculty members. Whether viewed separately or as a whole, the activities of President Branson and the Trustees was neither designed nor had the effect of suppressing plaintiffs' freedom of expression. Further, I find that there was no breach of any individual teaching contract or the collective bargaining agreement between the University and LUC-AAUP.

Accordingly, I arrive at the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of the action.

2. The plaintiffs are not entitled to damages or injunctive relief under the Constitution and laws of the United States, the Constitution of the Commonwealth of Pennsylvania, the individual employment contracts, or the

Collective Bargaining Agreement between Lincoln University and the Lincoln University Chapter of the American Association of University Professors.

3. The defendants are entitled to judgment in their favor and against the plaintiffs.

Oct. 26, 1979
DATE

/s/ JOSEPH L. MCGLYNN, JR. *J.*
Joseph L. McGlynn, Jr. *J.*

ORAL OPINION

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 78-2133

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA GUNN, THOMAS JONES, JULIUS BELLONE, DeFOREST RUDD, PETER F. HOFFER, MARIANNE RUSSO, DONALD PEIRCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF, LELAND SMUCKER, GRACE RIVERO, PEGGY GELBER and ANTONIO FUSTE

v.

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION and HERMAN BRANSON (as President of Lincoln University)

Before HON. JOSEPH L. McGLYNN, JR., *J.*

Philadelphia, Pa., October 1, 1979

(Now, 10:00 A. M., Monday, October 1, 1979, Court resumes.)

THE COURT: Good morning.

After considerable reflection and study, I have decided to grant defendants' motion under Rule 41(b).

The basic allegation underpinning the several causes of action asserted here is that the defendant University acting through its Board of Trustees and its President have been engaged in a scheme to prevent or suppress faculty criticism of University policy and thus have violated the Constitution and laws of the United States, the Constitution of Pennsylvania, the individual employment contracts of faculty members and the collective bargaining agreement between the University and the American Association of University Professors.

I have considered all of the testimony and reviewed more than 200 exhibits and I am convinced that plaintiffs have shown no right to relief.

As the evidence unfolded, it became increasingly apparent that the shoe was on the wrong foot and that the real victims in this controversy (apart from the students) were the defendants.

There existed on this campus what can best be described as academic anarchy, created and fostered by a cadre of faculty dissidents who embarked on a campaign of intimidation, obstruction, harrassment and personal vilification in order to accomplish their stated objective of ousting the President and some or all members of the Board of Trustees. The tactics employed by the plaintiffs, which were so uncharacteristic of the reasoned objectivity and detachment usually associated with the teaching profession, particularly at the university level, unquestionably had a disrupting effect on the University's primary mission—education and the advancement of the Arts and Sciences.

After weighing the evidence, I find that there was no attempt by the President of the University, the Board of Trustees or anyone associated with the University Administration, to suppress, stifle, chill or in any way inhibit the constitutionally protected activities of the faculty members. The protestations of the plaintiffs to the contrary notwithstanding, during this whole series of events they continued to express their views concerning the administration's decision and policies frequently and emphatically, and no doubt, they will continue to do so.

Even the specific instances complained of here were followed by speeches, meetings, letters to the editor, faculty resolutions, picketing or other modes of expression including physical confrontation and class interruption.

In short, plaintiffs' actions belie their words.

The best that can be said of the plaintiffs' case is that the President or the Board of Trustees took exception to the time, forum or manner in which individual faculty members chose to address the issues of concern to them, and they said so. That is the irony of this case: for here the plaintiffs seek to invoke the power of this Court to deny to the President of the University and its Board of Trustees the very right which the plaintiffs purport to protect.

I find as a fact that none of the action taken by the President or the Board of Trustees was designed, intended or had the effect of suppressing the plaintiffs' rights. Whether viewed separately or as a whole, the conduct complained of does not persuade me that the University or its President engaged in a scheme to stifle dissent or criticism. As I view the evidence, and I so find there was a reasonable basis for every action taken and every policy adopted, totally unrelated to a desire to limit the constitutionally protected right of the plaintiffs individually, or as members of the faculty.

Accordingly, judgment will be entered in favor of the defendants and against the plaintiffs.

These are general findings and conclusions only. More specific findings of fact and conclusions of law thereon as required by Federal rule of Civil Procedure 52(a) will be filed in due course.

This is my ruling on the Rule 41 motion, so there is no necessity to proceed with any evidence.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2490

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA GUNN, THOMAS JONES, JULIUS BELLONE, DEFOREST RUDD, PETER F. HOFFER, DONALD PIERCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF, and LELAND SMUCKER,

Appellants

v.

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, LINCOLN UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER EDUCATION, and HERMAN BRANSON, individually and as President of Lincoln University,

Appellees

(D. C. Civil No. 78-2133)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 10, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 4, 1979, be, and the same is hereby vacated and the cause is remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS
Clerk

November 25, 1980

Certified as a true copy and issued in lieu of a formal mandate on December 29, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2490

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA DUNN, THOMAS JONES, JULIUS BELLONE, DEFOREST RUDD, PETER F. HOFFER, MARIANNE RUSSO, DONALD PIERCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF AND LELAND SMUCKER,

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v.

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Appellees

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellees, Board of Trustees of Lincoln University of the Commonwealth

System of Higher Education, Lincoln University of the Commonwealth System of Higher Education, and Herman Branson, individually and as President of Lincoln University, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ DOLORES K. SLOVITER
Judge

Dated: December 19, 1980

No. 80-1580

APR 22 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

October Term, 1980

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY, LINCOLN UNIVERSITY, and HERMAN BRANSON, individually and as President of Lincoln University,

Petitioners,

v.

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA GUNN, THOMAS JONES, JULIUS BELLONE, DEFOREST RUDD, PETER F. HOFFER, MARIANNE RUSSO, DONALD PIERCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF and LELAND SMUCKER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Did the court of appeals err in reversing the district court and remanding for a new trial, and should this nonfinal judgment be reviewed at this time?

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No. 80-1580

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

BOARD OF TRUSTEES OF LINCOLN UNIVERSITY, LINCOLN UNIVERSITY, and HERMAN BRANSON, individually and as President of Lincoln University,

Petitioners,

v.

C. JAMES TROTMAN, MARY FARRELL, ANDREW MURRAY, VIRGINIA GUNN, THOMAS JONES, JULIUS BELLONE, DEFOREST RUDD, PETER F. HOFFER, MARIANNE RUSSO, DONALD PIERCE, RICHARD WINCHESTER, WILLIAM T. JOHNSON, EDWARD B. GROFF and LELAND SMUCKER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

II. COUNTERSTATEMENT OF THE CASE

Petitioners (defendants below), as they have throughout this litigation, focus on the underlying controversy between the faculty and administration at Lin-

coln University and wholly fail to analyze or discuss their concrete actions that form the basis of plaintiffs' constitutional claims — including explicit, written threats of dismissal directed at specific faculty members and a variety of punitive actions based on constitutionally protected speech.

The underlying conflicts between the administration and faculty do not raise constitutional issues and, unfortunately, are not unusual on college campuses in recent years. They concern issues like class size and the student/faculty ratio, and many reflect the shortage of funds available for education. What is unusual — and raises the constitutional issues decided by the court of appeals but mischaracterized and evaded in the Petition — is the administration's response to faculty disagreement and criticism: the administration and board of trustees of Lincoln, particularly the president, have punished, threatened, intimidated and suppressed faculty members with whom they disagree.

Lincoln is a predominantly Black institution with a long, rich history of academic freedom, democracy and achievement. Defendant Branson was appointed president in 1970 and early demonstrated an inability to tolerate criticism or disagreement. His intolerance first took the form of overly heated rebuffs and veiled threats. As the campus became embroiled over issues like class size and student/faculty ratio, the threats were no longer veiled. Constitutionally protected speech was prohibited; discipline was meted out with no regard for due process; and faculty members who were outspoken in opposition were removed as chairs of departments, involuntarily retired, denied deserved promotions, and discharged.

At the height of the controversy over the student/faculty ratio in the Spring 1977, Branson took an action that is unprecedented in legal or academic history. Citing what he claimed was a requirement to reduce the faculty to about three-quarters of its existing number, he sent one-year termination notices to *every*

faculty member, without regard to tenure status, seniority or likelihood of being among those supposedly to be terminated. This plan, referred to as "retrenchment" on the campus and in the record, was divulged to a committee of the faculty when Branson showed them a copy of the termination notices and announced that he would send them within one week. These retrenchment notices led to a vote of the faculty — by a margin of 46 to 10 — for the censure and removal of Branson.[1]

However, there was no retrenchment.[2] Several months later all but one of the retrenchment notices were rescinded. The faculty was not reduced by one-quarter; indeed, in that period, Branson hired *additional* faculty.

The one retrenchment notice not withdrawn was directed at Plaintiff Trotman, former chair of the English Department and an outspoken critic of the administration. Branson used the retrenchment plan as his critics had feared: although there was no retrenchment, the retrenchment notices were used to fire a leading critic of Branson by interpreting them to satisfy the one-year notice requirement for discharging a faculty member for other reasons.[3] Two binding arbitrations have resulted in judgments in favor of Trotman, but defendants have refused to abide by these arbitrations.[4]

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1. In the same period, a substantial portion of the Board was also dissatisfied with Branson, and five Board members resigned in late 1977 and early 1978.

2. This, and other facts stated herein, are either found by the court of appeals or are undisputed in the record.

3. Petitioners distort and mischaracterize the record in their description of Plaintiff Trotman's dismissal. See Opinion, A6-A7. See also footnote 4, *infra*.

4. The arbitrations are described by the court of appeals, App. A16, A16n.3. They resulted in orders that Trotman be reinstated with back pay. The second arbitration award included a specific finding that defendants acted in "bad faith" and retaliated against Trotman based on his criticisms of them. The award is being challenged by defendants in the state courts, but the only allowable grounds for the challenge are jurisdictional, and plaintiffs believe the appeal is frivolous.

Plaintiffs, who constituted twenty-five percent of the faculty when this lawsuit was filed (Opinion, App. A2), engaged in a variety of protected activities to express their views on these and other matters, including speaking out in faculty meetings, writing to state officials, writing letters to the editor that appeared in newspapers, speaking to the press, and picketing. The administration, of course, also has the right to express its views. But defendants have gone far beyond expression or disagreement with the accuracy or wisdom of plaintiff's positions.

The specific acts of defendants that formed the basis of plaintiffs' claims are well-described in the opinion of the court of appeals (App. A6-A15) under the following headings: (1) Dismissal of Trotman; (2) "Retirement" of Edward Groff (the "retirement" was involuntary); (3) Removal of Johnson from Chemistry Chair; (4) Arrests of Trotman and Farrell; (5) Bellone letter (threatening a faculty member with dismissal if he made a particular motion at a faculty meeting); (6) Disciplinary Meeting on Communication (defendants invited plaintiffs to a "meeting" that was actually a disciplinary hearing against plaintiffs for criticizing another faculty member in a memo); (7) Branson Letters Regarding Press Communications (concerning a series of letters from Branson to plaintiffs threatening discipline for speaking to the press); (8) Telegram Regarding Faculty Picketing; (9) Other Alleged Unconstitutional Conduct.

Respondents rely on the opinion of the court of appeals and will not restate or even sunmmarize these actions here. However, since Petitioners have wholly failed to analyze or discuss *any* of the concrete actions at issue and have seriously mischaracterized them,[5] we briefly

5. For example, Petitioners characterize their actions as "*after-the-fact* protests" (Petition, at 16; emphasis in original) when some, including the telegram quoted *infra*, were clearly before-the-fact and constitute prior restraints.

set out below the facts concerning one of these incidents so the matter — and constitutional import — will be clear.

In late April 1978, faculty members decided to conduct a peaceful vigil or picket during a visit to the campus by former President Ford. The vigil was not directed against the President but only attempted to draw his and others' attention to the problems at Lincoln. The night preceding the vigil, plaintiffs received this phone-delivered telegram at their homes (App. A12-A13):

> "Lincoln University considers any faculty picketing during term of collective bargaining to be in violation and unprofessional conduct, a cause for discipline up to dismissal.
>
> J. Freedley Hunsicker, Jr.
> *Attorney for the University*"

Mr. Hunsicker, who also represents Petitioners on this Petition,[6] testified at trial that the telegram was "authorized and sent by Branson." Opinion of the Court of Appeals, App. A12-A13. This constitutes a total ban on all picketing — without regard to time, place, manner or subject matter and with the most severe penalty possible and home delivery on the eve of a protected vigil.

The procedural context of the case is also at least left unclear in the Petition (at 7). This is an interlocutory

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6. Mr. Hunsicker was primary counsel for Petitoners-defendants throughout this litigation although he was a fact witness and his personal conduct is very much at issue. Plaintiffs raised the conflict of interest issue at the beginning of the trial. As counsel for Defendant Branson, Mr. Hunsicker had objected at a deposition, based on the attorney-client privilege, to questions asked of Branson concerning legal advice received from Mr. Hunsicker and the possibility of Branson's raising a good faith defense. Branson later testfied that Mr. Hunsicker had not discussed this objection or the attorney-client privilege with Branson prior to raising the objection, and when the whole matter was brought to the attention of the district court, Mr. Hunsicker withdrew his objection.

petition since the court of appeals only vacated the district court's dismissal of the case and remanded for a new trial. Opinion, App. A29-30.

III. SUMMARY OF ARGUMENT

The court of appeals reversed and remanded this matter to the district court for a new trial based on clearly established principles and legal errors. The Petition basically ignores the actual decision and requests review of issues that are either not ripe or not presented at all in this case.

IV. REASONS FOR DENYING THE WRIT

We discuss the substance of the Petition below, but it should be denied, in any event, because it is interlocutory. The court of appeals has only remanded the case to the district court for a new trial, so Petitioners are seeking review of a nonfinal judgment. In this procedural posture, certiorari is inappropriate absent "extraordinary inconvenience and embarrassment in the conduct of the case," *American Construction Co.* v. *Jacksonville, T. and K.R. Co.*, 148 U.S. 372, 384 (1893), which Petitioners have neither claimed nor addressed in the Petition. See also *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-85 (1952); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. and Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Fireman* v. *Bangor and Aroostook R.R.*, 389 U.S. 327 (1967); *Estelle* v. *Gamble*, 429 U.S. 97, 114 (1976) (Mr. Justice Stevens, dissenting).

Petitioners claim that the court of appeals departed from established principles of law in several respects. However, Petitioners have substantially misunderstood and/or misrepresented the court of appeals decision and have basically asked this Court to review issues that are either not ripe or not presented at all in this case. The

court of appeals carefully analyzed the district court's decision and determined that the trial court made several specific legal errors in dismissing plaintiffs' case. Since Petitioners essentially ignore these errors, we have briefly summarized them before discussing Petitioners' claims.

A. The Court of Appeals Decision

The court of appeals separately analyzed the three categories of constitutional violations alleged by Plaintiffs-respondents: (1) defendants' restrictions on plaintiffs' protected speech; (2) defendants' retaliatory actions against plaintiffs for protected speech; and (3) other alleged unconstitutional activities by defendants (mainly based on due process violations). The court held that the district court made errors of law in analyzing the first two categories and failed to address the claims in the third category, thus requiring reversal and a remand for a new trial.

Concerning the restrictions on speech, the court of appeals found that the district court had rejected plaintiffs' claims on the novel and erroneous grounds that defendants had acted in good faith and that defendants' actions did not totally deter plaintiffs from exercising their speech rights.

As to the good faith argument, the court of appeals correctly concluded that good faith cannot justify a constitutional violation, but rather is only relevant to the liability of individuals for damages. App. A19-A20. Since plaintiffs sought declaratory and injunctive relief against all the parties (including the University) as well as damages, good faith was not dispositive of their claims. See, e.g., *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Owens* v. *City of Independence*, 100 S.Ct. 1398 (1980).

The court of appeals rejected the second justification on three grounds: (1) the district court erroneously excluded testimony by plaintiffs and other faculty mem-

bers concerning the chilling effect of defendants' activities (App. A21-A22); (2) plaintiffs had, in any event, presented sufficient evidence of a chilling effect (App. A20-A21); and (3) even if plaintiffs were not totally deterred — iced, as opposed to chilled — they still can obtain relief (App. A20). On the last point, the court said:

> "It would indeed be ironic were we to hold that persons who are persevering and resolute, who overcome their inhibitions and fears to proceed on a course they believe constitutionally protected, would thereby lose the very protection which they rely on in asserting their rights." (App. A20).

The court of appeals found two errors in the district court's analysis of plaintiffs' retaliation claims. Contrary to defendants' assertions, the court clearly recognized that it is necessary to balance rights of freedom of expression against the institution's interests, consistent with the principle established in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968) and its progeny. App. A15, A25-A27. It concluded, however, that the district court adopted an erroneous standard. The district court held that the employee's speech is not protected if it has any "potentially disruptive impact," including remote, minor and wholly hypothetical impacts and without any need to balance such factors against plaintiffs' free speech rights. App. A67. It was the district court that failed to balance, and its standard would sanction suppression of almost all speech.

Although the court of appeals found that this standard was inappropriate, it concluded that this error alone might not warrant reversal. The court remanded because the trial court also erred in placing the burden upon plaintiffs to show that defendants' retaliatory actions would not have taken place "but for" the occurrence of the protected conduct, which is directly contrary to *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416-17, (1979) and *Mt. Healthy*

City Board of Education v. Doyle, 429 U.S. 274, 287 (1977). App. A27-A28. See also Petition, at 10-11, where this error is essentially conceded.

Finally, the court of appeals noted that there were other constitutional claims which were not even addressed by the trial court. It remanded those for the trial court to rule on before review. App. A29. Petitioners ignore these claims, but a new trial will be necessary to resolve them regardless of the outcome of this Petition.

B. The Issues Raised in the Petition

1. The Court of Appeals Adopted the Correct Standard and Burden for First Amendment Retaliation Claims

Petitioners argue that, concerning the retaliation claims, the court of appeals, first, refused to hold that the mere existence of any "potentially disruptive" impact renders speech unprotected and, second, placed the burden on defendants to show that plaintiffs' speech was unprotected. The first claimed error is no error at all: such impacts are to be *balanced* and do not, in and of themselves, render speech unprotected.[7] The second claimed error simply did not occur.

The court of appeals clearly and correctly set out the standards and burdens regarding a First Amendment retaliation claim:

> Examination of a teacher's claim of retaliation based on engagement in protected activity requires a three step process. First, the plaintiff must show

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7. Petitioners repeat the district court's error in the Petition, at 12: "Where, as here, the trial court finds that the activity was [potentially] disruptive, plaintiffs have failed to carry their initial burden of proof on the question of whether their conduct is protected." Petitioners, and the district court, leave out the crucial step: any such disruption should be *balanced* against plaintiffs' rights and are not, of themselves, dispositive.

that s/he engaged in protected activity. *See Pickering v. Board of Education,* 391 U.S. 563 (1968). In that case the Court stated that "the interests of the [employee] as a citizen, in commenting upon matters of public concern" must be balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," *id:* at 568, and held that comment on matters of legitimate public concern by public school teachers is ordinarily protected activity. Secondly, a claimant who demonstrates that the activity was protected must then show that the activity was a substantial or motivating factor in a decision or action taken against the claimant. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 287 (1977). Third, the defendant can still defeat plaintiff's claim by demonstrating that the same action would have been taken even in the absence of the protected conduct. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 416-17 (1979); *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. at 287. Put in another way, the employee can prevail only if the court finds that but for the protected activity, the employee would not have been removed. App. A15.

In its later consideration of the specific retaliatory actions in the case, the court of appeals extensively discussed the *Pickering* balance and determined, as previously noted, that the trial court erred in holding that a "potential disruption" of itself renders speech unprotected rather than balancing conflicting rights and interests. App. A26-A27. Nowhere does the court of appeals state that defendants have the burden in this regard; rather, as quoted above, they explicitly state that plaintiffs have that burden.

Petitioners distort the court of appeals decision by citing to language, in the section dealing with *restric-*

tions on speech, in which the lower court stated, "[t]hat much of the activity engaged in by plaintiffs falls within the protection of the First Amendment seems too evident to require any discussion except that acknowledgment of that fact was not expressly made by the district court." App. A16. Petitioners failed to note that the court, in footnote 4 (App. A17), explicitly defined what it meant by the phrase "protection of the First Amendment," namely that it was used to denote language or activity which falls into the category of "speech". The footnote goes on to state that such speech might have diminished protection under circumstances such as a dismissal and refers to their later discussion of *Pickering*.

It is clear that the court of appeals (unlike the district court) was very sensitive to the important balancing necessary in the case of a claimed retaliatory dismissal of a public employee. Nor did the court state or imply that defendants have the burden of proof in assessing the balance; any suggestion by petitioners to the contrary grossly misinterprets the decision.[8]

Additionally, it should be noted that, contrary to the impression given in the Petition, the district court did not reject all of plaintiffs' claims of retaliatory action based upon findings of disruption. Although there is general language in the trial court's oral opinion about the disruptive effect of the tactics of plaintiffs, he did not conclude in that statement or in the detailed written findings that all of plaintiffs' activities fell outside the First Amendment. In fact, in the written decision, in

---

8. Defendants refer, in this regard, to the court's statement that they would have an "opportunity to show" that plaintiffs' activity was not protected. Petition, at 13, quoting Opinion, App. A25. It is stretching beyond reason to suggest that this accomplishes, or even is about, a placement of the burden on defendants. The district court dismissed plaintiffs' case after the completion of plaintiffs' evidence. Thus, defendants have had no opportunity, as yet, to offer proof, and the court is merely noting in the passage referred to that defendants will have that opportunity on remand.

which each incident is discussed, the district court made only three specific findings that plaintiffs' activities were unprotected: (1) the activities in Dr. Willis' class; (2) Trotman's expression of criticism or dissent; and (3) Johnson's statements concerning Defendant Branson. The court of appeals agreed as to the first incident, and took no definitive position on whether, in the latter two situations, defendants' actions violated plaintiffs' constitutional rights, only noting, correctly, that the trial court was erroneous if it concluded that, based upon the content alone, Dr. Johnson's criticism of the President of the University placed it outside the First Amendment. App. A17-A18.

The trial court rejected most of plaintiffs' claims of retaliatory action on the ground that defendants had taken such actions for reasons other than plaintiffs' protected activities. It is based upon this conclusion that the court of appeals reversed, since such a conclusion must be questioned in light of the trial court's error in placing the burden on plaintiffs to show that such action would not have occurred but for the protected conduct.

In summary, the court of appeals has carefully followed the rules established by this Court concerning claims of retaliatory action by a public employer. Although petitioners may object to the application of those standards to their conduct or wish to urge this Court to modify its rulings, at this stage of the proceedings review is not justified and would serve little until the trial court has applied those standards to the specific claims made by plaintiffs.

2. The Court of Appeals Clearly Followed This Court's Decisions Concerning Plaintiffs' Claims of Restrictions Placed on Their Protected Speech

Petitioners essentially raise two issues concerning the court's decision on plaintiff's restriction claims: (1) are prior restraint standards appropriate in this case; and (2) is there a justiciable controversy?

Petitioners' analysis is basically defective in two regards. First, Petitioners have ignored entirely the reasons for the court of appeals' reversal of the district court with respect to these claims. As previously noted, the trial court rejected plaintiffs claims on the grounds that defendants acted in good faith and that plaintiffs were not sufficiently deterred from exercising their rights of expression. *Nowhere* in its opinion did the district court conclude that: (1) the law concerning restrictions on prior restraints was not relevant to these claims; (2) with regard to these incidents of restrictions, activities by plaintiffs were not protected by the First Amendment; or (3) plaintiffs' claims were not justiciable, although defendants vigorously presented this theory to the trial court. Petitioners wholly fail to address the reasons given by the court of appeals for reversal of the trial court or to present any reason why the case should be reviewed by this Court at this point.

In any event, the court of appeals accurately stated the law with regard to prior restraints on speech, and Petitioners have failed to present any authority, of this Court or any other court, that conflicts with the court of appeals. As Petitioners noted, those courts which have reached the question whether actions by school officials or other public administrators threatening discipline of or reprimanding employees for their speech have concluded that such actions may amount to First Amendment violations. See, e.g., *Yoggerst* v. *Stewart*, 623 F.2d 35 (7th Cir. 1980); *Aebisher* v. *Ryan*, 622 F.2d 651 (2d Cir. 1980). These decisions are consistent with the well-recognized rule that direct threats of sanctions or other, lesser means of coercion and intimidation short of direct prohibition may amount to constitutional violations. See *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963). Restrictions on speech prompt this analysis whether they are made by a university president, *Healy* v. *James*, 408 U.S.

169 (1972), through a notice from a state agency, *Bantam Books* v. *Sullivan, supra,* or through a memorandum from a director of a local agency, *Alderman* v. *Philadelphia Housing Authority,* 496 F.2d 164 (3d Cir. 1974).

What is critical in determining a First Amendment violation is whether an official with authority has issued a restriction prohibiting or suppressing protected activity without sufficient state interest to justify such an encroachment. This is true whether such prohibition is labelled a prior restraint or not. See *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Pickering* v. *Board of Education, supra.* The court of appeals correctly noted that prior restraint requires a greater showing in order to justify such a restriction, but balancing is required in both situations. It is untenable to suggest that a university administrator can never be challenged for attempts at suppressing speech, particularly in light of the value placed in an academic community on the free flow of ideas. See *Tinker* v. *Des Moines Community School District,* 393 U.S. 503, 506-07 (1969). The court of appeals decision is entirely consistent with these decisions, and Petitioners have failed to present any conflicting authority. At most, Petitioners can be understood to be objecting to the application of the law to this case, but since a final determination of that question has not been made by the lower courts, review at this time is not justified.

Petitioners have further obscured this analysis by discussing authority that some challenges to regulations that seem to suppress expression may not be justiciable because the claims therein lack a case or controversy. Neither of the lower courts found this relevant because many of the threats in this case are explicit, specifically directed and in writing. The case or controversy requirement is satisified whenever there is a "genuine threat" of adverse action. *Ellis* v. *Dyson,* 421 U.S. 426 (1975); *Steffel* v. *Thompson,* 415 U.S. 452 (1974). The decision

of the District of Columbia Circuit that Petitioners claim is in conflict with this decision, *National Treasury Employees Union* v. *Kurtz*, 600 F.2d 984, 986-89 (D.C. Cir. 1979), denied relief specifically because the regulation challenged there was generally directed and did not specify punishment or define the conduct that will be disciplined. The court explicitly distinguished the situation where — as in this case — there is a "credible threat." As the court of appeals here noted, in this case there were several specifically directed, explicit threats of dismissal for specifically defined (and protected) conduct, other language which "implicitly" threatened action and acts of retaliation. The "genuine threat" standard was clearly satisfied.

3. The Court of Appeals Did Not Reject the Balancing Test in Assessing Plaintiffs' Restrictions Claims

Defendants assert that, in assessing plaintiffs' claims of restrictions on speech, the court of appeals rejected the balancing test and foreclosed any consideration of the administration's interests in promoting the efficient operation of the University. The court simply did not make either ruling.

The *sole* basis for defendants' assertion is their reference to the court's comparison of the standards governing retaliations and restrictions. Petition, at 21. Though Petitioners use ominous language and predict grave consequences, all the court said is that prior restraints are particularly disfavored in our system and tradition of civil liberties, which has been accepted since *Near* v. *Minnesota*, *supra* was decided in 1931. Indeed, as we have detailed above, the court discussed balancing extensively, and it specifically recognized the needs of the University in any such balance: "We do not intimate that a University or other public employer cannot properly promulgate a general rule giving notice that employ-

ees who engage in conduct which causes disruption are subject to disciplinary action." App. A25 n.8.

Three additional points should be noted: (1) the district court did not find plaintiffs' speech in these restriction incidents was unprotected but denied relief on other grounds discussed above;[9] (2) there is no evidence that such speech was unprotected (defendants' counsel even specifically admitted in his testimony that the vigil at issue in the telegram incident was protected); and (3) defendants' repeated statements to the effect that the lack of findings by the court of appeals of clearly erroneous factual determinations below somehow indicates an acceptance of those determinations (e.g., Petition, at 4, 22) are inappropriate since the court explicitly stated that it was not reaching that question because of legal errors that required reversal (App. A28 n.12).

4. The Court of Appeals Decision Will Not Have An Adverse Impact on the Administration of a University

Petitioners' final argument is that the application of the court's analysis would substantially interfere with the operation of any university. This is an exaggerated assertion that is particularly inappropriate given the current disposition of the case. The court of appeals has only stated that faculty members may come to federal court to seek judicial scrutiny of alleged administration prohibitions against speech and retaliatory actions based on speech. Plaintiffs emphatically reject Petitioners'

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9. The restrictions included: (1) the telegram from the University's counsel to several of the plaintiffs notifying them of possible dismissal if they picketed on the occasion of President Ford's visit to the campus; (2) several threatening letters to plaintiffs by the administration concerning plaintiffs' statements to the press; and (3) a letter threatening dismissal for making a motion at future faculty meetings. Nowhere in the trial court's detailed findings did it state or imply that the specific speech involved in these incidents was disruptive and therefore unprotected by the First Amendment.

suggestion, which they seem to make, that administrators of public colleges should be wholly free from federal court scrutiny of their actions that infringe on First Amendment rights. The appropriate resolution of the conflicting rights and interests is the balancing test mandated by this Court and the court of appeals, which has not, as yet, been applied to the facts in this case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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